84-1704

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARSHALL MECHANIK,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS FOR REVIEW

1. Whether the joint testimony of two drug enforcement agents before a grand jury, in flagrant violation of Rule 6(d) of the Federal Rules of Criminal Procedure, requires that the entirety of a superceding indictment returned by that grand jury after such joint testimony be dismissed.

2. Whether probable cause to arrest can exist where the police officer had no belief that he could, in fact, arrest the defendant.

3. Whether the United States Court of Appeals for the Fourth Circuit denied Petitioner the effective assistance of counsel by placing his appeal under the control of another lawyer and by requiring Petitioner's and three other defendants' appeal of a four-month trial to be consolidated into one brief limited to 60 pages.

PARTIES TO THE PROCEEDING

Parties before the court below were, in addition to Petitioner Marshall Mechanik, Jerome Lill, Steven Riddle, Shane Zarintash, and Mark Chadwick.

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No. _____

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MARSHALL MECHANIK,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Marshall Mechanik, prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit upholding his conviction for traveling interstate with intent to promote an unlawful enterprise in contravention of 18 USC 1952(a)(3).

OPINIONS BELOW

The published opinion of Judge Copenhaver concluding that there was a violation of Rule 6(d) of the Federal Rules of Criminal Procedure, but refusing to dismiss the indictment, appears in the Appendix at Page D-1. *United States v. Lill, et al.,* 511 F. Supp. 50 (S.D.W. Va. 1980).

The unpublished opinion of Judge Copenhaver denying the Petitioner's renewed motion to suppress for an illegal search, seizure and arrest appears in the Appendix at Page E-1.

The Order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's Motion for Leave to File a Separate Brief appears in the Appendix at Page C-1.

The original, published opinion of the Fourth Circuit, reversing in part and affirming in part the Petitioner's conviction, appears in the Appendix at Page B-1.*United States v. Mechanik, et al.,* 735 F.2d 136 (4th Cir. 1984).

The final, per curium, opinion of the Fourth Circuit on rehearing en banc, reaffirming its original opinion, appears in the Appendix at Page A-1.

JURISDICTION

The Court of Appeals for the Fourth Circuit entered a final opinion in the Petitioner's case, which it reaffirmed

on March 1, 1985, after rehearing the case en banc. Jurisdiction of this Court rests upon 28 USC §1254(1).

CONSTITUTIONAL PROVISION AND COURT RULES INVOLVED

Amendment VI to the Constitution of the United States in pertinent part provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Rule 6(d) of the Federal Rules of Criminal Procedure provides:

> **Who May Be Present.** Attorneys for the Government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Rule 19 of the Rules of the United States Court of Appeals for the Fourth Circuit provides:

> Consolidated Cases and Briefs—Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by court order, unless leave to the contrary is granted upon good case shown. In consolidated cases lead

counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the Clerk within seven (7) days of the date of the order of consolidation. In the absence of an agreement by counsel, the Clerk shall designate lead counsel. The individual so designated shall be responsible for the coordination, preparation and filing of the brief and appendix.

STATEMENT

Background

At 12:53 a.m. on June 6, 1979, a DC-6 aircraft landed at the Kanawha County airport, outside Charleston, West Virginia. The plane's brakes failed, it rolled off the end of the runway, and it crashed (J.A. 1872)[1]. Following the accident, two Ryder trucks, which had been observed parked near the executive air terminal, drove away from the airport (J.A. 1879-82).

Approximately 20 mountainous miles away and 40 minutes after the airplane crash, a man painting an apartment in the town of Montgomery, West Virginia, heard a "big thump". He looked out the window and saw a set of rollers fall out the back of a 30-foot Ryder truck (J.A. 231). The truck stopped, a man got out of the cab, pulled the rollers to the side of the road, got back in the cab, and the truck drove off (J.A. 232).

The painter also saw a police officer, Sergeant Meredith White of the Montgomery Police Department, coming out

[1] "J.A." refers to the Joint Appendix filed in the Court of Appeals.

of a convenience store nearby. The man yelled to the officer to "check that truck" (J.A. 233, 253, 281, 332). The officer got his partner, Officer Earl Osborne, out of the store and they pursued the truck, catching it 2.3 miles away, in the mountains (J.A. 281).

There being no place to pull off the two-lane highway, the truck stopped in the road (J.A. 835). The officers left their automobile and approached the truck with weapons drawn; Osborne brandished a shotgun and went to the rear passenger side of the truck, and White carried a pistol and stationed himself at the front driver's side of the truck (J.A. 293, 1135).

Three men were in the cab, and one was in the truck body (J.A. 1136, 296). All were ordered out, spread-eagled against the side of the truck, and searched (J.A. 1148-51). The driver, Marshall Mechanik, gave Sergeant White his operator's license and a valid truck rental agreement; Osborne took them to run an NCIC check of the vehicle (J.A. 1138).

Two policemen from the Town of Smithers arrived in time to see Sergeant White, while covered by the shotgun-wielding Osborne, climb into the cab of the truck and retrieve a blue case (J.A. 694, 737). He asked who owned it, and when one of the truck passengers responded it was his, Sergeant White ordered him to open it (J.A. 694). The case contained an aviation radio, which radio the prosecu-

tion relied upon to link the persons in the truck with the plane which crashed at the Kanawha County airport.

In the meantime, Allan Rogers, a dispatcher with the Montgomery Police Department, was trying to complete the license check on the truck. James Beckner, a *civilian* teletype operator with the West Virginia Department of Motor Vehicles, had received the request from Rogers at about 2:00 a.m., and discovered that the license plate properly referred to a Ryder rental truck (J.A. 603). Coincidentally, Beckner had been scanning the police wire, and had learned that an airplane had crashed in Charleston and that Ryder-type trucks had left the airport shortly thereafter (J.A. 590-91). Although he had no law enforcement status, Beckner wanted "to play a hunch" (J.A. 604). Consequently, he told Rogers, the Montgomery police dispatcher, to "hold the truck under surveillance" (J.A. 605). Rogers, in turn, radioed Officer Osborne that the Department of Motor Vehicles wanted "us to hold them in reference to a plane crash" (J.A. 1260). The truck passengers were then handcuffed and taken back to the Montgomery police station where the radio, which White took with him, was turned in (J.A. 352).

Sergeant White told one of the Smithers policeman that he stopped the truck because someone he knew told him to check it out (J.A. 692). Sergeant White did not issue any traffic citation to the truck driver, Marshall Mechanik (J.A. 336), nor did he at any time during the en-

counter question any of the suspects regarding traffic matters or indicate that anyone had committed any traffic infraction (J.A. 693, 741). In fact, Sergeant White testified that at the time of the stop, he could not arrest Mechanik for any of the alleged traffic offenses (J.A. 336-37). In addition, the only reason the truck passengers were returned to Montgomery was because of the radioed message to hold them; Sergeant White had no inkling of why he was asked to bring them in (J.A. 355-56, 698, 739).

Proceedings In the District Court

A. On August 10, 1979, two DEA agents, Jerry Rinehart (the officer in charge of the investigation as well as the first agent to reach the scene immediately after the plane crash) and Randolph James, *appeared simultaneously* before the grand jury that ultimately indicted the Petitioner. The two men were sworn contemporaneously and *testified together* before the grand jury. Each remained in the grand jury room during the testimony of the other. They gave intertwining testimony, with one witness being permitted to add to the testimony of the other witness before the questioning of the former witness continued. The two witnesses, testifying together, literally summarized the entire case before the grand jury (J.A. 137-223). On the same day these two witnesses appeared collectively, the grand jury voted a twelve-count superseding indictment against twelve persons, including Marshall Mechanik (J.A. 109-123). He was charged with

conspiracy and traveling in interstate commerce in furtherance of an unlawful criminal enterprise.

The defendants endeavored in advance of trial to discover whether Rule 6(d) of the Federal Rules of Criminal Procedure had been violated. One defendant, on behalf of the all defendants, filed an Omnibus Motion requesting that the Government provide a list of all persons who appeared before the grand jury, to determine whether any unauthorized persons entered the grand jury room (J.A. 136). The prosecution refused to disclose that the two witnesses testified before the grand jury jointly.

Two weeks after the trial began, on February 28, 1980, defense counsel discovered, quite accidentally, the DEA agents' dual appearance before the grand jury, when portions of Agent Rinehart's grand jury testimony was delivered to defense counsel as "3500" material. Counsel immediately moved for a dismissal of the indictment. The Honorable Dennis R. Knapp denied the motion, somehow finding there was no violation of Rule 6(d). The defendants then sought a stay of the proceedings and initiated an interlocutory appeal to the Fourth Circuit. On April 10, 1980, the appellants' petitions for a Writ of Mandamus and a Writ of Prohibition were denied as premature.

On April 25, 1980, Judge Knapp suffered a heart attack, and the case was transferred to the Honorable John T. Copenhaver.

On May 22, 1980, the defendants renewed their motion to dismiss because of the Rule 6(d) violation. Judge Copenhaver reserved decision until after the return of the jury's verdict. On August 15, 1980, in a lengthy opinion, Judge Copenhaver concluded that the joint appearance of the two DEA agents before the grand jury clearly violated Rule 6(d). *United States v. Lill, et al.,* 511 F. Supp. 50 (S.D.W. Va. 1980). However, he refused to dismiss the indictment.

B. On January 19, 30 and 31, 1980, seven months after the incident in Montgomery, an extensive suppression hearing was held before Judge Knapp. He held that the stop of the truck was a proper "investigative stop" based upon traffic violations and that there was probable cause for Sergeant White to arrest the defendants for the offenses charged (J.A. 1028-32).

Judge Copenhaver felt compelled, after he was appointed to the case, to reconsider the search and seizure issue. He found certain elements of Sergeant White's earlier testimony to be untrue, and he found that the search of the truck was based on mere suspicion (J.A. 1590). Accordingly, he ruled that, *inter alia,* the aviation radio must be suppressed (J.A. 1593). Two weeks later, Judge Copenhaver issued a written order reversing himself. He found probable cause to arrest the truck driver, Mechanik, for traffic violations, and he upheld the search

of the truck because of exigent circumstances (J.A. 1696, 1698).

The trial took four months. On June 27, 1980, after five days of deliberation, the jury found four of the defendants guilty. Marshall Mechanik was convicted of conspiracy and of traveling interstate in furtherance of an unlawful business enterprise. On August 15, 1980, Marshall Mechanik was sentenced to two terms of five years in prison to run concurrently, and a $10,000 fine.

Proceedings In the Court of Appeals

The Court of Appeals, *sua sponte,* pursuant to its Local Rule 19, consolidated the four cases on appeal,[2] and required counsel to select a "lead" counsel. All the defendants objected to consolidation, upon the grounds there were conflicts among them and the issues were too complex to consolidate. The Court of Appeals denied all motions for leave to file separate briefs, but did increase the allowable pages in the joint brief from 50 to 60. Edwin F. Kagin, Jr., counsel for Steven Riddle, was named lead counsel. Mr. Kagin was one of the counsel on appeal who had participated in the trial of this case; this counsel was the only attorney who had not participated in the trial. In

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[2] Another defendant appealed from the refusal of the trial court to dismiss the charges against him after the jury was unable to reach a determination. That defendant was allowed to file a separate brief.

addition, Mr. Kagin was centrally located.[3]

The designated lead counsel assigned the issues; this counsel was assigned the search and seizure issues, destruction of evidence, and withholding of exculpatory evidence. Lead counsel, having participated in the trial, retained the trial-based substantive issues of insufficiency of the evidence and prosecutorial misconduct.

Shortly before the brief was due, the lead counsel withdrew as such, and Mr. Fahringer was substituted as lead counsel. The former lead counsel did not submit the issues he was to brief, which fact was unknown to this counsel until he received a copy of the brief as submitted. The substituted lead counsel utilized only one of this counsel's assigned issues—that on search and seizure. The substantive issues which were placed in the brief all spoke to the substituted lead counsel's client.

The natural consequence of this process was that only six issues concerning four defendants and arising out of a four-month trial covering 131 volumes of transcript were presented to the Court of Appeals, and the exposition of those issues was truncated due to the severe page limitations imposed.

The Fourth Circuit ruled that only the conspiracy convictions must be reversed due to the violation of

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[3] Counsel on appeal were: Herald Price Fahringer, located in New York City; Richard Chosid, located in Bloomfield Hills, Michigan; Michael D. Graves, located in Tulsa, Oklahoma; and Edwin F. Kagin, Jr., located in Louisville, Kentucky.

Federal Rule of Criminal Procedure 6(d). That court gave very short shrift to other issues raised; in its original opinion it disposed of the search and seizure questions in one paragraph. The Fourth Circuit, in its per curiam opinion after rehearing en banc, did not address the search and seizure issue at all.

REASONS FOR GRANTING THE WRIT

1. This Court must settle the conflict among the Circuit Courts as to the proper remedy for a flagrant abuse by the United States Attorney of the grand jury system.

The Government in this case violated Rule 6(d) of the Federal Rules of Criminal Procedure by having two narcotics agents testify jointly before the grand jury which indicted the Petitioner. Nevertheless, the trial court refused to dismiss the indictment, and the Court of Appeals reversed the trial court only as to one count of the indictment, holding that, because the violation of Rule 6(d) occurred during deliberations on a superseding indictment, any count contained in the prior indictment which appeared in the superseding indictment was not tainted by the violation, and therefore need not be dismissed.

The Fourth Circuit's holding directly conflicts with the decision by the Fifth Circuit in *United States v. Fulmer,* 722 F.2d 1192 (5th Cir. 1983). In *Fulmer,* as here, the defendant was tried pursuant to a superseding indictment. During trial, also as here, counsel for the defendant

discovered that an FBI agent was not sworn as a witness when he read prior grand jury testimony to the grand jury that returned the superseding indictment. The district court granted Fulmer's motion to dismiss the indictment with prejudice because the FBI agent was not a sworn witness, and thus was not authorized to be present under Rule 6(d).

On appeal to the Fifth Circuit, the Government *conceded that the dismissal was proper,* and argued only that the dismissal should have been without prejudice. The Fifth Circuit agreed with the Government, but was careful to emphasize that "the presence of an unauthorized person results in a *per se* invalidity of the indictment. No showing of prejudice is required to quash an indictment secured with the presence of unauthorized persons in the grand jury room." *Id.,* at 1195, N. 5.

The protection of the grand jury system enunciated by the Fifth Circuit is by far the better rule. Because of the importance of the integrity of the grand jury, that protection deserves this Court's imprimatur.

The grand jury occupies a high place in our hierarchy of constitutional values. *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 399 (1959); *Costello v. United States,* 350 U.S. 359 (1956). Among its primary functions is the "protection of citizens against unfounded criminal prosecutions." *Branzburg v. Hayes,* 408 U.S. 665, 686-687

(1972). To fulfill this constitutional objective, it is imperative that the integrity of the grand jury be maintained and that it not be subjected to any undue Government influence.

Rule 6(d) was designed to help ensure that the Government could not easily manipulate a grand jury. Accordingly, it provides that only one *"witness"* (singular) under examination may be present, although it authorizes "attorneys" and "interpreters" (plural) to be present. As the Court in *United States v. Echols,* 542 F.2d 948, 951 (5th Cir. 1976), *cert. denied,* 431 U.S. 904 (1977), explained:

> By limiting those persons who may be present before the grand jury, Rule 6(d) serves the dual purpose of safeguarding the secrecy and privacy of the grand jury proceedings and of protecting the grand jurors from the possibility of undue influence or intimidation from unauthorized persons. To effectuate these purposes, courts generally have indicated that this Rule should be strictly construed.

Because of the possibility of undue influence through actions of the Government, the courts have long held that the presence of an unauthorized person in the grand jury room for any significant duration of time mandates that the indictment be voided. *E.g., Latham v. United States,* 226 F. 420 (5th Cir. 1915) (unauthorized person was present to record testimony throughout grand jury proceedings); *United States v. Edgerton,* 80 F. 374 (D. Mont.

1897) (expert witness remained after testifying and asked questions of another witness); *United States v. Carper*, 116 F. Supp. 817 (D.D.C. 1953) (deputy marshals present throughout testimony of prisoner witnesses); *United States v. Borys*, 169 F. Supp. 366 (D. Alaska 1959) (mother of witness present throughout daughter's testimony); *United States v. Daneals*, 370 F. Supp. 1289 (W.D. N.Y. 1974) (unauthorized agency regional counsel appeared and advised grand jury); *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977) (unauthorized person present throughout as observer and assistant prosecutor); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977) (unauthorized person was present throughout testimony of a witness and conducted part of questioning); *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) (government attorney who testified before a grand jury and then resumed prosecutorial role violated Rule 6[d]).

There are no cases to the contrary. Insignificant, brief intrusions by unauthorized persons into the grand jury room may not require dismissal of an indictment, *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), but such intrusions are a far cry from the situation pertaining in this case, where two narcotics agents testified together before the grand jury.

This Court must not allow to go unchallenged the

abrogation by the Court of Appeals of cherished principals of due process. This Court should hold the Government, as it itself recognized in the *Fulmer* case, *supra,* and the Courts of Appeals, to constitutional consistency by affirming that a flagrant abuse of the grand jury by the United States Attorney results in a dismissal, without prejudice, of the entirety of the resulting indictment.

This Court must grant this Petition to settle this vitally important area of the law.

2. This Court should review the novel determination of the Court of Appeals that a police officer can have probable cause to arrest when the officer has not concluded that an arrestable offense has occurred.

In its original opinion, the Court of Appeals found that probable cause existed to arrest the Petitioner, Marshall Mechanik, for moving traffic offenses. Accordingly, that court held the search of the truck and seizure of the aviation radio were proper as incident to an arrest. However, these conclusions rest upon an illogical and improper interpretation of the requirement for probable cause to arrest, and therefore cannot be allowed to stand.

To have probable cause to justify an arrest without a warrant means that facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe that, under the circumstances, the suspect has committed an offense. *Brinegar v. United States,* 338

U.S. 160, 175-176 (1949); *Michigan v. DeFillippo,* 443 U.S. 31, 37 (1979). *A priori,* the officer must have a belief or conclusion that an arrestable offense has been committed by the person to be arrested before that person is arrested.

In the case at bar, Sergeant White testified, without contradiction, that, at the time of the traffic stop, he was completely unaware of his ability to arrest the driver, Mechanik, for the violations alleged to have occurred. At best, Sergeant White believed he could only issue the driver a citation. The occupants of the truck were, apparently, detained to seek additional information of some other, unspecified, crime. As the record shows, Sergeant White made no effort to speak to anyone about "traffic violations." Later, the occupants of the truck were taken into custody pursuant to the request of a civilian dispatcher for a matter entirely unrelated to any traffic offenses.

This case, thus, is different from the usual warrantless arrest case, where the police officer believes a suspect committed an arrestable crime and therefore seizes him. Those cases turn on whether the facts and circumstances known to the police officer were sufficient to allow him to conclude there was probable cause to arrest the suspect. *See, e.g., Michigan v. DeFillippo, supra; Hill v. California,* 401 U.S. 797 (1971); *Beck v. Ohio,* 379 U.S. 89 (1964).

In the case at bar, the police officer made no conclusion that there was probable cause to arrest. Thus, in order to rule as it did, the Court of Appeals had to stand probable cause on its head. According to that court, a police officer need not have probable cause to arrest at the time of the arrest because probable cause to arrest may be attributed to the police officer after the fact.

This dangerous conclusion cannot be allowed to stand, because it is an open invitation to police and prosecutors to engage in post hoc reconstruction of events ostensibly establishing probable cause to arrest in order to introduce in court evidence otherwise constitutionally impermissible. That this temptation exists on the part of the Government has been recognized by this Court:

> An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. [*Beck v. Ohio, supra,* at 96.]

The best way to stop post hoc rationalizations, reconstructions and shams is for this Court to censure them. Retroactively probable cause is not and cannot be permitted. *Henry v. United States,* 361 U.S. 98, 102-104 (1959); *Johnson v. United States,* 333 U.S. 10, 16-17 (1948); *Sibron v. United States,* 392 U.S. 40, 62-63 (1968).

This Court should take this opportunity to restore the

integrity of the concept of probable cause to arrest from the violent abuse it has suffered at the hands of the Court of Appeals.

3. This Court should determine the question whether the rules of the Court of Appeals denied the Petitioner the effective assistance of counsel.

A defendant is entitled to counsel at every critical stage of the criminal justice system, including the first appeal. *Douglas v. California,* 372 U.S. 353 (1963). "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771, N. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions concerning the conduct of the defense, *Strickland v. Washington,* 466 U.S. _____, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

We submit that, by its Rule 19, The United States Court of Appeals for the Fourth Circuit, in the context of this case, denied Petitioner Marshall Mechanik the effective assistance of counsel. Petitioner was denied the *effective* assistance of counsel because his counsel, under Rule 19, was unable to choose the issues to present on behalf of his client on appeal, and in fact was able to present only one procedural issue to the Court, which issue that court effectively ignored.

By placing Petitioner's appeal under the control of attorneys not retained by Petitioner, and by refusing to expand the consolidated brief adequately to allow presentation of important issues, the Court of Appeals "made it so unlikely that any lawyer could provide effective assistance that ineffectiveness [can be] properly presumed. . . . " *United States v. Cronic,* 466 U.S. _____, 80 L. Ed. 2d 657, 669, 104 S. Ct. _____ (1984).

Court rules which so limit the presentation of a case are a travesty of justice. Accordingly, this Court should accept this case to decide the important issue of whether the Court of Appeals, through its rules, denied Petitioner the effective assistance of his counsel in contravention of the Sixth Amendment to the Constitution of the United States.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1985

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-5166

United States of America
Appellee

versus

Marshall Mechanik,
a/k/a Michael Patrick Flanagan
Appellant

No. 80-5167

United States of America
Appellee

versus

Shahbaz Shane Zarintash
Appellant

No. 80-5168

United States of America
Appellee

versus

Jerome Otto Lill,
Steven Henry Riddle
Appellants

No. 80-5169

United States of America
Appellee

versus

Mark Douglas Chadwick
Appellant

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, District Judge. (CR 79-20056-11; 79-20045-07; 79-20056-09; 79-20045-06; 79-20056; 79-20045; 79-20056-04; 79-20045-05)

Argued December 5, 1984 Decided March 1, 1985

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, WILKINSON and SNEEDEN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Herald Price Fahringer (Lipsitz, Green, Fahringer, Roll, Schuller & James; Edwin F. Kagin; W. Dale Green; Michael Graves; Hall, Estill, Hardwick, Gable, Collingsworth & Nelson on brief) and Richard Chosid for Appelants; Marye L. Wright, Assistant United States Attorney (David A. Faber, United States Attorney on brief) for Appellee.

PER CURIAM:

I.

For reasons stated in the majority opinion of the panel, *United States v. Mechanik,* 735 F.2d 136 (4th Cir. 1984), the judgments convicting Mechanik, Zarintash, Lill, and Riddle on count 1 of the indictment are reversed.

Dissenting, Judge Russell, Judge Hall, Judge Chapman, Judge Wilkinson, and Judge Sneeden would affirm for the reasons stated in the dissent to the panel opinion, 735 F.2d at 141.

II.

The judgments convicting Mechanik on count 10 and Lill on counts 2 and 4 are affirmed for reasons stated in the panel opinion.

Judge Widener and Judge Phillips dissent. They would dismiss these counts of the indictment for the same reasons that count 1 is dismissed.

III.

The jury was unable to reach a verdict with respect to Chadwick, and the district court declared a mistrial. He appealed assigning several errors, including the denial of the motion to dismiss the indictment and the denial of his motion for a judgment of acquittal on the ground of insufficient evidence. He claims that retrial will subject him to double jeopardy. The panel dismissed his appeal for lack of jurisdiction, citing *United States v. Ellis,* 646 F.2d 132 (4th Cir. 1981).

After the panel opinion was filed, the Supreme Court decided *Richardson v. United States,* 104 S. Ct. 3081 (1984).

The Court held that after a mistrial was declared because of a hung jury, the defendant's contention that retrial would subject him to double jeopardy because evidence sufficient to convict had not been presented raised a colorable claim of double jeopardy appealable under 28 U.S.C. § 1291.* The court held, however, that no valid claim of double jeopardy had been asserted because the declaration of a mistrial following a hung jury does not terminate the original jeopardy. The Court also said, 104 S. Ct. at 3086 n.6:

> It follows logically from our holding today that claims of double jeopardy such as petitioner's are no longer "colorable" double jeopardy claims which may be appealed before final judgment. A colorable claim, of course, presupposes that there is some possible validity to a claim. . . . Since no set of facts will support the assertion of a claim of double jeopardy like petitioner's in the future, there is no possibility that a defendant's double jeopardy rights will be violated by a new trial, and there is little need to interpose the delay of appellate review before a second trial can begin.

The order denying Chadwick's motion for a judgment of acquittal and subjecting him to retrial did not terminate the original jeopardy to which he was subjected. Accordingly, as *Richardson* explains in note 6, he now has no colorable claim of double jeopardy which may be appealed before final judgment. His appeal is dismissed.

No. 80-5166 (Mechanik): Count 1 reversed; count 10 affirmed.

No. 80-5167 (Zarintash): Count 1 reversed.

No. 80-5168 (Lill): Count 1 reversed; counts 2 and 4 affirmed.

No. 80-5168 (Riddle): Count 1 reversed.

No. 80-5169 (Chadwick): Dismissed.

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*The Court noted that *United States v. Ellis*, 646 F.2d 132, 135 (4th Cir. 1981), reached a contrary conclusion. *See* 104 S.Ct. at 3083 n.4.

WILKINSON, Circuit Judge, with whom Judge Russell, Judge Hall, Judge Chapman, and Judge Sneeden join, concurring in part and dissenting in part:

I dissent from the judgment of the court insofar as it invokes "a per se rule of invalidity" to reverse the convictions and dismiss the conspiracy count in the superseding indictment. *United States v. Mechanik,* 735 F.2d 136, 140 (4th Cir. 1984). The creation of this extraordinary remedy is not authorized by Fed.R.Crim.P. 6(d), not justified by statute or Constitution, and not consistent with the precedent of this court. Without cause or compensation, the public will now pay the price, and convicted criminal defendants will now reap the windfall benefit, of a prosecutorial mistake. This result is not right in a system of criminal justice which has become enormously complex and in which even seasoned judges and attorneys are not immune from error. Here the district court found neither bad faith on the part of the government nor prejudice to the rights of defendants. It denied the motion of defendants to dismiss the indictment because of the violation of Rule 6(d). *United States v. Lill,* 511 F.Supp. 50 (S.D. W.Va. 1980). Because I believe that the district court properly addressed and properly resolved the issue, I would affirm the convictions on all counts.

I.

No one disputes that the government violated Rule 6(d) by offering the joint testimony of Agents James and Rinehart. The question is how the district court should have responded to that prosecutorial error. In confronting this problem, the first point of reference must be the rule itself:

> **Who May Be Present:** Attorneys for the government, the witness under examination, interpreters when

> needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

As the court observes, the language is "plain and unequivocal in limiting who may appear before a grand jury." 735 F.2d at 139. Clarity of prohibition, however, does not imply a rule of reversal for any and all violations. Fed.R.Crim.P. 7(c), for example, is equally plain and unequivocal in requiring the indictment to refer specifically to statutes or regulations that the defendant is said to have infringed, but errors in the citations, or complete omission of the citations, will not support dismissal of an indictment unless the error has misled the defendant to his or her prejudice. *See* Fed.R.Crim.P. 7(c) (3). More generally, almost any proscription of prosecutorial conduct may be cast in unambiguous terms. The appropriate remedy for a particular form of misconduct is determined not by the directness of expression but by the context, the purpose, and the practical workings of the standard involved.

The immediate context of Rule 6(d) is the conception of justice envisioned by the Federal Rules of Criminal Procedure. The rules operate as an efficient means to truth and a partial guarantee of integrity, without any pretension of being, in every detail, a necessary ritual of fairness. The rules are not an end in themselves. The rules live for, and through, the judgment. They deter noncompliance by requiring reversal where departure from the rules has affected the judgment—a threat completely adequate to ensure the obedience of the participants in the trial process. Some judicial values may be compromised by an error which has not affected the judgment, but if truth and integrity

are respected, acceptance of the result offsets such a compromise by advancing nobler values of decision: the innocent are freed, the guilty are named, the commitment of resources to litigation is husbanded.

Fed.R.Crim.P. 52(a) embodies this principle, stating broadly:

> **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Binding on this court under Rule 54(a), the plain and unequivocal langugage of Rule 52(a) requires us to review indictments tainted by rules violations, including Rule 6(d) violations, with attention to the likelihood that the defendant has been disadvantaged by the procedural failure. *See generally United States v. Dougherty*, 473 F.2d 1113, 1127-28 (D.C. Cir. 1972). Adoption of a per se rule of invalidity, which allows for no such Rule 52(a) analysis, overlooks the axiom of interpretation that the rules should be read together as an integrated, harmonious whole. Ironically, the result is that a construction intended to compel adherence to the federal rules, 735 F.2d at 139, is in itself unfaithful to the restriction of enforceability, and the conception of justice, recognized by the rules themselves.

The same conclusion is compelled by related acts of Congress and decisions of the Supreme Court. The salient statute, 28 U.S.C. § 2111, provides that

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Originally enacted to prevent appellate courts from looming above criminal trials as "impregnable citadels of technicality," *Kotteakos v. United States,* 328 U.S. 750, 759 (1946) (citation omitted), 28 U.S.C. § 2111 echoes Fed.R.Crim.P. 52(a) in its insistence that "substantial rights" must be implicated before a conviction may be reversed. Again, that such substantial rights have been affected is determined not merely by asking whether a guarantee has been violated but by asking "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos,* 328 U.S. at 764. Toward the same end, an important line of Supreme Court cases beginning with *Chapman v. California,* 386 U.S. 18 (1967), establishes that even some constitutional norms are not so independently sensitive that intrusion must always compel reversal of the subsequent judgment. In reviewing these intrusions, the appellate court will determine whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 24 *quoting Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963).

Together the statute and the decisions refute a policy of per se dismissal based solely upon the promise and the purpose of Rule 6(d). To be sure, the rule does reflect considerations of justice in ensuring grand jury privacy and in preventing undue influence. But Fed.R.Crim.P. 6(d) is no more central to due process, and no more demands acknowledgment through automatic reversal, than many protections that have been subjected to harmless error analysis. *See e.g., Chapman* (Fifth Amendment right to prosecutorial silence about defendant's failure to testify); *Coleman v. Alabama,* 399 U.S. 1, 11 (1970) (Sixth Amendment right to counsel at preliminary examination);

Chambers v. Maroney, 399 U.S. 42, 53 (1970) (Fourth Amendment right to suppression of unlawfully seized evidence). Like these guarantees, and like the majority of procedural provisions, Rule 6(d) must be addressed in any remedial analysis through its influence on the judgment. How Rule 6(d) should somehow attain a status the Supreme Court has refused to accord non-prejudicial departures from most constitutional norms is inexplicable.

Nor is a per se response to Rule 6(d) violations suggested by the additional due process limitation of the harmless error principle to defects and consequences that are susceptible to evaluation. As Justice Harlan noted in *Chapman v. California*, the effect of some procedural errors is "so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless." 318 U.S. at 52 n. 7 (Harlan, J., dissenting). This rationale explains automatic reversal for errors that suffuse the proceeding, distorting the very perspective of the fact-finder, and by extension, the perspective of the reviewing court. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of assistance of counsel at trial). In contrast, the error at issue here involved one isolated session of prosecutorial testimony. By extracting that evidence and examining the remainder of the record, a court may determine the probability that the testimony influenced the grand jury with no more uncertainty than is inevitable in routine applications of harmless error.[1]

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[1] Obviously, another case might involve a Rule 6(d) violation more difficult to trace, just as another case might involve a Rule 6(d) violation that had prejudiced a defendant. The range of possibilities only emphasizes that each situation must be examined in its own context rather than on a per se basis.

Alluding to the "difficult burden" upon a defendant required to show the prejudicial effect of Rule 6(d) violation, the court appears to refine the above argument and to suggest that the effect of an error is decisively less apparent to the accused. 735 F.2d at 139. Under this theory, the limited availability of grand jury information so constricts the defendant's capacity to assess the violation as to mandate dismissal of tainted indictments. But a per se rule does nothing to lighten the truly difficult burden on the defendant—the *detection* of all Rule 6(d) violations.[2] The per se remedy instead addresses the burden of showing *prejudice*, a problem for which 18 U.S.C. § 3500, Fed.R.Crim.P. 6(e)(3), Rule 16(a)(1)(A), and Rule 26.2 already equip the knowing victim. Furthermore, dismissal of the indictment is too drastic a solution to this perceived disadvantage. As the district court intimated here, the complications of defendant's position can be alleviated by placing responsibility on the prosecution to demonstrate to the court the absence of prejudice, a result further suggested by the duty of the government to prevent Rule 6(d) violations. *See also Chapman v. California*, 386 U.S. at 24.

II.

Neither Rule 6(d) nor the limitations upon the harmless error principle will support a per se rule of invalidity for indictments obtained after unauthorized parties have appeared before the grand jury. The proper response is "to identify and then

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[2] The district court would handle the problem of detection through its command that "in order to assure that the one-witness rule is observed in subsequent grand jury proceedings, the prosecutor will henceforth be directed routinely to advise the court with respect to each criminal case indictment whether the requirements of Rule 6(d) have been fulfilled." *United States v. Lill*, 511 F.Supp. at 61.

neutralize the taint by tailoring relief appropriate in the circumstances." *United States v. Morrison,* 449 U.S. 361, 365 (1981). Indeed, the last time that this court reviewed an indictment on Rule 6(d) grounds, it followed precisely that approach. *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982). Noting that "each situation should be addressed on a *sui generis* basis," the court examined the nature of the violations, the length of the proceedings, the culpability of the government, and the likelihood that the defendants had suffered any prejudice through the error. *Id.* at 1184-85. Concluding that the violations had been isolated, the grand jury secrecy had been maintained, that the proceedings had been extensive, that the government had merely been negligent, and that the defendants had suffered no injury, the court declined to dismiss the contested counts of the indictment. *Id.*[3]

The district court followed precisely the same approach here, anticipating *United States v. Computer Sciences Corp.* in every respect. It found that only one violation had occurred, that it had not compromised privacy interests, and that it had taken place after the grand jury had returned much of the final

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[3] Its invocation of a per se rule of invalidity notwithstanding, the plurality opinion attempts to adopt a measure of this *sui generis* approach in its disposition of the other counts of the indictment. Noting that "this case, involving a superseding indictment, presents a unique situation," the court affirms the convictions on the substantive counts because "there was a valid basis for the charges they set forth that was independent of the unauthorized joint appearance of the agents." 739 F.2d at 140. This rationale, which echoes the basis of the unchallenged district court conclusion about the conspiracy count, cannot be reconciled with a per se rule. Recognizing the inconsistency, two judges concurring in the dismissal of the conspiracy count have also voted to dismiss the entire indictment.

indictment. The court noted that the trial pursuant to the indictment had consumed three months, at enormous expense to the government and the defendants, and had reached a conclusion that was in itself unchallenged. The court had already observed, in an earlier memorandum opinion, that the government conduct revealed no evidence of bad faith and no intent to confuse or mislead the grand jury. Finally, the court conducted a comprehensive inquiry into the likelihood of prejudice and determined that any improper influence was possible only "in the sense that all things are possible." *Id.* at 61. This path of reasoning parallels that of *United States v. Computer Sciences Corp.* so closely that its rejection—in favor of a per se rule of invalidity—can only be interpreted as overruling a very recent precedent. *See United States v. Mechanik*, 735 F.2d 136, 141-42 (Hall, J., dissenting).

Distinctions between the underlying circumstances of *United States v. Computer Sciences Corp.* and the facts presented by this case do nothing to reconcile the contradiction; the method of analysis is the crucial area of conflict. Moreover, I see no reason to disagree with the conclusion of the district court on this record. The comparison of testimony and the history of this particular grand jury fully support the determination that the defendants suffered no prejudice through the joint appearance of the agents. The other facts were properly weighed, and the relief granted by the court was appropriate to the situation. The wisdom of the decision below, no less than the import of authority above, and a respect for recent precedent within this court, dictates affirmance of these convictions.

III.

Perhaps no aspect of this court's responsibility is more delicate than the review of criminal convictions challenged because of acknowledged procedural errors. We must identify the many changing faces of substantial right and mere technicality. We must be mindful of the complicity of the judicial system in the improper conduct. And, without meeting the jury or hearing its deliberations, we must imagine why a group of men and women chose to believe as they did. The awareness of our own limitations and the consequences of our mistakes understandably tempt us to withdraw into a sanctuary of procedure, to require every judgment to honor the rituals of rules as well as the essence of fairness. But our duty precludes that retreat. We must at least attempt to determine whether an imperfect justice remains nonetheless an act of justice. Because the decision of the court forsakes that attempt, I must, with respect, dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-5166

United States of America
Appellee

-v-

Marshall Mechanik,
a/k/a Michael Patrick Flanagan
Appellant

No. 80-5167

United States of America
Appellee

-v-

Shahbaz Shane Zarintash
Appellant

No. 80-5168

United States of America
Appellee

-v-

Jerome Otto Lill,
Steven Henry Riddle
Appellants

No. 80-5169

United States of America
Appellee

-v-

Mark Douglas Chadwick
Appellant

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, District Judge. (*District Court docket numbers)

Argued February 9, 1984 Decided May 16, 1984

Before WINTER, Chief Judge, HALL, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Herald Price Fahringer, Diarmuid White, Student; Richard Chosid (Lipsitz, Green, Fahringer, Roll, Schuller & James; Michael B. Pollack; Edwin F. Kagin, Michael Graves, Hall, Estill, Hardwick, Gable, Collingsworth & Nelson on brief) for appellants in 80-5166, 80-5167, and 80-5168; (W. Dale Greene on brief) for appellant in 80-5169; David A. Faber, United States Attorney (Marye L. Wright, Assistant United States Attorney on brief) for appellee.

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*CR 79-20056-11; 79-20045-07; 79-20056-09; 79-20045-06; 79-20056; 79-20045; 79-20056-04; 79-20045-05

APPENDIX B

BUZNER, Senior Circuit Judge:

Steven H. Riddle, Shahbaz S. Zarintash, Jerome O. Lill, and Marshall Mechanik, convicted of drug related offenses, assign as principal error the district court's denial of their motion to dismiss the indictment because the prosecutor violated Federal Rule of Criminal Procedure 6(d)[1] Mark D. Chadwick, charged with conspiracy, appeals the district court's denial of a judgment of acquittal after the jury was unable to reach a verdict.

Because two witnesses testified simultaneously before the grand jury in violation of rule 6(d), we conclude that count 1, charging conspiracy, should have been dismissed. Counts 2, 4, and 10, charging substantive offenses, were not tainted by this impropriety and need not be dismissed.[2] We find no cause for reversal in the other assignments of error.

I.

This prosecution arose out of the crash of an aircraft carrying approximately 10 tons of marijuana at an airport near Charleston, West Virginia. The same grand jury returned two

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[1] Riddle and Zarintash were convicted of conspiring to commit offenses involving marijuana (count 1). Lill was convicted of conspiracy (count 1), importing marijuana (count 2), and possession with intent to distribute marijuana (count 4). Mechanik was convicted of conspiracy (count 1) and traveling in interstate commerce to carry on an illegal business enterprise (count 10).

[2] The district court's opinion, *United States v. Lill*, 511 F.Supp. 50 (S.D. W.Va. 1980), recounts in meticulous detail all proceedings pertinent to the issue involving rule 6(d), making it unnecessary for us to advert to much of the record.

indictments.[3] The first was returned a week after the plane crashed. There was no irregularity in the grand jury proceedings that led to the return of this indictment.

The investigation continued, and drug enforcement agents gathered additional evidence. For this reason, the prosecutor drew a superseding indictment for consideration by the grand jury. In support of the superseding indictment, the prosecutor presented two agents who were sworn and questioned together. The transcript discloses that they alternated in their testimony, occasionally supplementing each other's answers. Each was not simply a passive auditor of the other's examination. The appellants were tried on the superseding indictment.[4]

The principal difference between the indictments with respect to the appellants was count 1 charging conspiracy. The superseding indictment alleged the commission of additional overt acts by the appellants. These additional allegations were the subject of the agents' joint testimony. Counts 2, 4, and 10 were identical to their counterparts in the original indictments except for immaterial changes and numbering.

Unsuccessful in obtaining grand jury transcripts before trial, the appellants were unaware of the agents' joint appearance until one of them testified at the trial. Then, pursuant

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[3] The district court found, 511 F.Supp. at 58-59:

> It is especially significant to note that the two indictments were returned by the same grand jury. The court's review of the attendance and voting records of that grand jury reveals that each of these indictments was returned by a unanimous vote. A nucleus of the same seventeen grand jurors voted for OSC the first indictment but did not vote on the second, while two others voted for the second indictment but did not vote on the first.

[4] Other persons were also named as defendants. Some pled guilty, some were acquitted, and one is a fugitive.

to 18 U.S.C. § 3500 (Jencks Act), the prosecutor furnished a partial transcript that disclosed this incident. The district court initially denied a motion to dismiss the indictment, but later, on resubmission, it took the motion under advisement and proceeded with the trial.[5]

After the jury returned its verdict, the district court denied the motion to dismiss. It ruled that the joint appearance of the agents violated rule 6(d). It concluded, however, that the appellants had failed to show prejudice primarily because other testimony corroborated the overt acts added to the superseding indictment.

II.

Rule 6(d) provides that only "[a]ttorneys for the government, the witness under examination, interpreters . . . and . . . a stenographer or operator of a recording device may be present while the grand jury is in session. . . ." The rule is designed, in part, to insure that grand jurors, sitting without the direct supervision of a judge, are not subject to undue influence that may come with the presence of an unauthorized person. *See United States v. Echols*, 542 F.2d 948, 951 (5th Cir. 1976);

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[5] Judge Knapp initially denied the motion. After he became ill, Judge Copenhaver presided pursuant to Fed.R.Crim.P. 25(a).

United States v. Kazonis, 391 F. Supp. 804, 805 (D. Mass. 1975), *aff'd without opinion,* 530 F.2d 962 (1st Cir. 1976).[6]

There is no doubt that, as the district court found, the simultaneous testimony of two agents constituted a violation of rule 6(d). The rule refers to "the witness" in the singular, in contrast to "[a]ttorneys for the government." This language was deliberate and consistent with traditional practice. *United States v. Carper,* 116 F. Supp. 817, 819-820 (D.D.C. 1953). Indeed, courts consistently have held that the presence of one witness during the testimony of another witness at grand jury proceedings taints an indictment. *See e.g., United States v. Treadway,* 445 F. Supp. 959, 962 (N.D. Tex. 1978); *United States v. Bowdach,* 324 F. Supp. 123, 124 (S.D. Fla. 1971); *United States v. Edgerton,* 80 F. 374, 375 (D. Mont. 1897). The government cites no case to the contrary. Consequently, each agent was an unauthorized person at the grand jury sessions any time the other agent was testifying.

We reject the argument that defendants must show that a rule 6(d) violation prejudiced them before an indictment may be dismissed. Rule 6(d) is plain and unequivocal in limiting who may appear before a grand jury. Requiring a defendant to show prejudice would impose a difficult burden that could undermine

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[6] In *Kazonis,* 391 F.Supp. at 805, the court succinctly stated the controlling precept and its reasons:

> It is an accepted principle of the criminal law that the presence of an "unauthorized person" before a grand jury voids an indictment. This is not a mindless incantation, however, and relates to two extremely pragmatic considerations:
>
> (1) that the proceedings be private,
>
> (2) that witnesses and grand jurors sitting without the protection of a presiding justice be free from the risk of intimidation attendant upon the presence of numbers of prosecution witnesses, particularly police witnesses, in the grand jury.

the protection that the rule provides. *Carper,* 116 F. Supp. at 820. Indeed, most federal courts considering the matter have agreed that a showing of prejudice is not necessary to dismiss an indictment because of a rule 6(d) violation. *See, e.g., Echols,* 542 F.2d at 951; *United States v. Phillips Petroleum Co.,* 435 F. Supp. 610, 618 (N.D. Okla. 1977); *United States v. Borys,* 169 F. Supp. 366, 367-68 (D. Alaska 1959).

Our decision in *United States v. Computer Sciences Corp.,* 689 F.2d 1181 (4th Cir. 1982), does not depart from this line of cases. *Computer Sciences* reversed the district court's dismissal of an indictment by a grand jury that was interrupted five times. Each intrusion lasted no more than a minute or two and brought the proceedings to an abrupt halt. We held that such "technical, trivial, harmless violations of no significant duration" did not nullify the jury's work.[7] Other courts also have held that dismissal is not warranted when the grand jury proceedings were halted during brief, inadvertent intrusions of unauthorized persons. *See United States v. Kahan & Lessin Co.,* 695 F.2d 1122, 1124 (9th Cir. 1982) (citing *Computer Sciences*); *United States v. Rath,* 406 F.2d 757, 757 (6th Cir. 1969).

In this case, by contrast, the proceedings continued in the presence of an unauthorized person. The agents, alternating their testimony before the grand jury, referred to themselves as the collective "we," backed up each other in the description of

[7] Nevertheless, we added, 689 F.2d at 1186:

> We should not be understood as commending the practice here. With the exception of the maintenance man, all of the intruders were apparently under the control of the prosecutors, who were obviously not diligent in keeping the santity of the grand jury room inviolate. Prosecutors should not consider what we have written as in any way amounting to an encouragement to depart from scrupulous compliance with Fed.R.Crim.P. 6(d). Having been fortunate enough to survive the attack here by the skin of their teeth on the basis of the record as a whole, they cannot count with any assurance on a similar conclusion on another record involving unauthorized grand jury room intrusions.

incriminating evidence, and supplemented each other's presentation. This joint effort could have added to each agent's credibility and could have had an undue influence on the grand jurors' decision to return the superseding indictment, especially where both witnesses were government officials. *See United States v. Daneals,* 370 F. Supp. 1289, 1296 (W.D.N.Y. 1974); *Bowdach,* 324 F. Supp. at 124.

In sum, we conclude that the joint appearance of the agents was a violation of rule 6(d). Because the proceedings were not halted when both were in the grand jury room, the indictment is invalid. "No showing of prejudice is required to quash an indictment secured with the presence of unauthorized persons in the grand jury room." *Echols,* 542 F.2d at 951.

III.

This case, involving a superseding indictment, presents a unique situation. Counts 2, 4, and 10 were returned in the initial indictment under different numbers by the same grand jury after proceedings that were properly conducted. The superseding indictment simply incorporated these counts in virtually the identical form in which they appeared in the initial indictment. Unlike the conspiracy count, there was a valid basis for the charges they set forth that was independent of the unauthorized joint appearance of the agents. Consequently, the invocation of a per se rule of invalidity is inappropriate for counts 2, 4, and 10.

Probable cause was found for the offenses charged in counts 2, 4, and 10 by the grand jury when it returned the initial indictment, which was not tainted by a violation of rule 6(d). Incorporation of these counts in the superseding indictment did not make them any less valid. Consequently, we conclude that the district court did not err by refusing to dismiss these counts.

IV

Three other assignments of error require but brief comment. The district court did not err by admitting into evidence a ground-to-air radio that the police seized from the cab of a truck they were chasing. The police had probable cause to stop the truck and arrest its driver for several violations of traffic laws. Probable cause to arrest authorized the police to search the passenger compartment. *New York v. Belton*, 453 U.S. 454, 460 (1981). Formal arrest need not have preceded the search. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980). Additionally, the search was permissible because the police had a reasonable belief based on specific facts that the occupants were dangerous. *Michigan v. Long*, _____ U.S. _____, 103 S. Ct. 3469 (1983).

The district court properly admitted Chadwick's postconspiracy statement to his sister and his sister's grand jury testimony. The court properly instructed the jury that this evidence was admitted only against Chadwick. Because the statement did not specifically identify the other appellants, its admission did not violate the principles explained in *Bruton v. United States*, 391 U.S. 123 (1968). *Cf. United States v. Seni*, 662 F.2d 277, 282 (4th Cir. 1981).

The district court's denial of Chadwick's motion for a judgment of acquittal is not an appealable order. *United States v. Ellis*, 646 F.2d 132 (4th Cir. 1981); *United States v. Carnes*, 618 F.2d 68 (9th Cir. 1980). Chadwick's reliance on the concurring opinion in *Ellis* is misplaced, for the evidence amply sufficed to warrant denial of the motion.

V

We find no merit in the appellants' other assignments of error. The conspiracy convictions of appellants Lill, Zarintash, Mechanik, and Riddle are reversed because of the violation of rule 6(d). On remand, the district court should dismiss count 1 of the superseding indictment. In all other respects, the judgment is affirmed.

No. 80-5166 (Mechanik): Count 1 reversed, count 10 affirmed.

No. 80-5167 (Zarintash): Count 1 reversed.

No. 80-5168 (Lill): Count 1 reversed; counts 2 and 4 affirmed.

No. 80-5168 (Riddle): Count 1 reversed.

No. 80-5169 (Chadwick): Appeal dismissed for lack of jurisdiction.

HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in all aspects of the majority's opinion except for its holding that the violation of Federal Rule of Criminal Procedure 6(d) was of such magnitude as to compel the dismissal of appellants' convictions for conspiracy. In my view, the majority has misconstrued the applicable law in evaluating this issue. Thus, because I would affirm the conspiracy convictions, I must dissent in part.

In *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied,* _____ U.S. _____ (1983), this Court held that five brief intrusions by unauthorized persons during a grand jury investigation did not require dismissal of the indictment stemming from those proceedings. In reaching this conclusion, we emphasized that when evaluating alleged violations of Rule 6(d) "each situation should be addressed on a *sui generis* basis." *Id.* at 1185. Applying this rule to the facts of

that case, we found that *Computer Sciences* was "a case *'absent demonstrable prejudice* or substantial threat thereof' so that 'dismissal of the indictment [was] inappropriate.' " *Ibid.* (quoting *United States v. Morrison,* 449 U.S. 351, 365 (1981) (emphasis added).[1]

In a carefully reasoned opinion, the district judge in the instant case followed the guidelines enunciated in *Computer Sciences.* Judging the case on its own peculiar facts and merits, he found that although a violation of Rule 6(d) had occurred when the government agents testified jointly before the grand jury, it had not been of such magnitude as to require dismissal of the indictments for conspiracy. Following this Court's lead in *Computer Sciences,* the district judge placed considerable emphasis on the question of whether appellants suffered demonstrable prejudice.[2]

Judge Copenhaver made a detailed analysis of the possible prejudicial impact of the Rule 6(d) violation on appellants' conspiracy indictments. It is true that appellants were tried on the superseding indictment and that several alterations and additions had been made in that indictment with respect to the conspiracy count. After carefully evaluating these changes, Judge Copenhaver found that each such alteration or addition was "either supported by testimony apart from the [agents'] joint testimony or became moot by virtue of the acquittal of [codefendants] Kook and James Chadwick."[3] Pursuant to this

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[1] The Court later reiterated this point by stating that "The case before us, in short, is one where there has been no . . . prejudice to the defendant." 689 F.2d at 1185.

[2] The district judge also considered relevant case law, legislative history, and policy considerations in making his decision.

[3] *United States v. Lill,* 511 F.Supp. 50, 59 (S.D. W.Va. 1980).

analysis, he concluded that the possibility of prejudice existed only "in the sense that all things are possible," and that "the existence of actual prejudice is so utterly remote [as to] appropriately be disregarded."[4] Indeed, even on appeal appellants have been unable to advance any basis for a claim of prejudice.

The majority, citing case law from other circuits for the proposition that no showing of prejudice is required to quash an indictment in violation of Rule 6(d),[5] reverses the district judge's decision on the conspiracy count without considering any of the aforementioned factual findings. In so doing, it has, in effect, tried to establish the very *per se* rule which this Court rejected in *Computer Sciences*. The majority has ignored the guidelines enunciated in *Computer Sciences* requiring the district judge to evaluate such cases "on a *sui generis* basis." In my view, the majority is bound by *Computer Sciences* and may not rely on the case law of other circuits to reverse appellants' convictions. Such a decision is particularly undesirable here, where the part of the superseding indictment found to be bad closely tracked the charging portion of the original indictment and in no way surprised or prejudiced the defendants.

For the foregoing reasons, I would affirm appellants' conspiracy convictions as well as their convictions on the substantive counts.

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[4] *Id.* at 61.

[5] *See United States v. Echols*, 542 F.2d 948 (5th Cir. 1976); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D. Okla. 1977); *United States v. Borys*, 169 F.Supp. 366 (D. Alaska 1959).

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-5166(L)

United States of America
Appellee

versus

Marshall Mechanik,
a/k/a Michael Patrick Flanagan
Appellant

No. 80-5167

United States of America
Appellee

versus

Shahbaz Shane Zarintash
Appellant

No. 80-5168

United States of America
Appellee

versus

Jerome Otto Lill,
Steven Henry Riddle
Appellants

No. 80-5169(L)

United States of America
Appellee

versus

Mark Douglas Chadwick
Appellant

Upon consideration of appellant Mechanik's motion to file a separate brief and appellants' motion for an extension of time to file brief;

IT IS ORDERED that the motion for a separate brief is denied and the briefing schedule is extended to allow appellants to file their consolidated brief on or before *November 7, 1983.*

FOR THE COURT – BY DIRECTION

/S/ William K. Slate, II
CLERK

APPENDIX D

UNITED STATES of America

v.

Jerome Otto LILL, Mark Douglas Chadwick, Shahbaz Shane Zarintash, Marshall Mechanik, Steven Henry Riddle.

Crim. A. Nos. 79-200045, 79-20056

United States District Court,
S. D. West Virginia,
Charleston Division.

Aug. 15, 1980.

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Robert B. Kin, U.S. Atty., Rebecca A. Betts, J. Timothy DiPiero, Asst. U. S. Attys., Charleston, W. Va., for plaintiff.

Richard G. Chosid, Bloomfield Hills, Mich., for Lill.

W. Dale Greene, Charleston, W. Va., for Chadwick.

Michael B. Pollack, New York, for Zarintash.

D. J. Esposito, Richmond, Va., Alan Silber, Newark, N.J., for Mechanik.

Edwin F. Kagin, Jr., Louisville, Ky., for Riddle.

MEMORANDUM ORDER

COPENHAVER, District Judge.

This matter is before the court on the defendants' motion to dismiss by virtue of a violation of Rule 6(d) of the Federal Rules of Criminal Procedure in that two government agents appeared simultaneously and testified interchangeably as witnesses before the grand jury returning the second of two indictments in this case. This issue was reserved from prior rulings by the court.

The procedural history of defendants' motion is as follows: The first of two indictments in this case was returned on June 14, 1979. In his omnibus motion filed on July 6, 1979, defendant Zarintash, asserting the possibility of a violation of Rule 6(d), sought a list of all persons appearing before the grand jury. All defendants thereafter filed motions adopting the various pretrial motions filed by each defendant. A second or superceding indictment was returned on August 10, 1979. Defendants then moved to have all pre-trial motions made applicable to the August 10th indictment. By order entered January 4, 1980, Judge Dennis R. Knapp denied all pre-trial motions which had not been previously ruled upon. On several occasions prior to trial defendants unsuccessfully sought disclosure of the transcripts of the grand jury testimony in connection with various pre-trial motions.

Trial of seven of the twelve named defendants commenced under the superceding indictment on February 19, 1980. On February 28, 1980, defendants received a partial transcript of the grand jury testimony of Drug Enforcement Administration Agent Jerry Rinehart pursuant to 18 U.S.C. § 3500 which revealed that Agent Rinehart testified before the grand jury simultaneously with DEA Agent Randolph James just prior to

the returning of the superceding indictment. The defendants thereupon moved for dismissal of the indictment on the basis of a violation of Rule 6(d). By order entered on March 14, 1980, defendants' motion to dismiss and their alternative motion to stay the trial pending appeal was denied by Judge Knapp. While the trial continued, defendants filed a Notice of Appeal and petitioned Circuit Judge James M. Sprouse on March 19, 1980, for a stay pending appeal. The stay was denied by order entered on March 25, 1980. On April 10, 1980, a panel of the United States Court of Appeals for the Fourth Circuit, consisting of Circuit Judges Hall, Phillips and Sprouse, denied defendants' petition for a writ of mandamus and for a writ of prohibition.

Thereafter, Judge Knapp was unexpectedly hospitalized. On April 28, 1980, he directed that this action be transferred to the docket of the undersigned judge. On May 22, 1980, defendants moved for rehearing of their motion to dismiss the indictment on the ground of unauthorized appearances before the grand jury. The court took that motion under advisement while the trial continued in progress.

When the trial concluded July 3, 1980, two of the seven defendants on trial were acquitted. Of the remaining five, named in the caption above, the jury was unable to reach a verdict as to Mark Chadwick. Jerome Lill was found guilty on counts one, two and four, Marshall Mechanik was found guilty on counts one and ten, Seven Riddle was found guilty on count one, and Shahbaz Zarintash was found guilty on count one.

I.

The event giving rise to the two indictments and subsequent jury trial in this criminal action was the crash landing of a DC-6 aircraft laden with some ten tons of marijuana at the Kanawha

County Airport, Charleston, West Virginia, at 12:53 a.m., on June 6, 1979. On June 12, 1979, a federal grand jury convened to investigate the crash, and on June 14, 1980, after having heard approximately thirty witnesses, the first of two indictments was returned (No. 79-20045 CH).[1] The June 14th indictment consisted of one conspiracy count and seven substantive counts and named nine defendants.[2]

On July 31, August 2, 9 and 10, the same grand jury received further testimony regarding the June 6, 1979, DC-6 crash. On August 10, 1979, the grand jury returned a second, superceding indictment consisting of one conspiracy count and eleven substantive counts and adding three defendants (No. 79-20056).[3] The conspiracy count in the August 10th indictment was amended and expanded as set forth, *infra,* at 59-60.[4]

As noted, the trial of seven of the twelve defendants named in the August 10th indictment commenced on February 19,

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[1] The June 14, 1980, indictment was omitted from publication at the suggestion of the court.

[2] The nine defendants are: Breck Dana Anderson, David Thomas Seesing, Jerome Otto Lill, Gregory Louis McCafferty, Mark Douglas Chadwick, Shahbaz Shane Zarintash, Marshall Mechanik, Leon Jacques Gast, and Steven Henry Riddle.

[3] The three additional defendants are: James F. Chadwick, Craig Bruce McGilvray, and Russell Kook.

[4] Pursuant to the court's rulings on the government's motion to dismiss filed at the conclusion of its case in chief and defendants' motions to strike and for judgment of acquittal filed at the close of the evidence, the August 10, 1979, indictment was significantly redacted. The August 10, 1979 and the redacted indictments were omitted from publication at the suggestion of the court.

1980.[5] On February 28, 1980, Agent Rinehart testified on behalf of the government, at which time the government furnished defendants with a portion of the transcript of Agent Rinehart's grand jury testimony as § 3500 material. The transcript disclosed that on August 10, 1979, Agent Rinehart was placed under oath simultaneously with fellow-DEA Agent James. The agents were sworn immediately prior to the reading of portions of the proposed superceding indictment to the grand jury by Assistant United States Attorney Hoffman. Questions were then propounded to Agents Rinehart and James by United States Attorney King. Assistant United States Attnorneys Hoffman and DiPiero, and by the grand jurors.

More specifically, the agents' joint testimony commenced with Agent Rinehart who testified regarding changes made in the first eight paragraphs of the conspiracy count in the proposed superceding indictment. Agent James interjected once at the conclusion of this phase of the agents' joint testimony in response to a juror's question directed to Agent Rinehart regarding the flight experience of defendants (and pilots) Anderson and Seesing:

> JUROR: You don't know how many [flight] hours or anything like that?
>
> MR. RINEHART: No.
>
> MR. JAMES: The way you would determine their hours is from their last medical. I think David Seesing was the pilot who probably had the best credentials for flying. He had ratings in addition to what Anderson had.

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[5] Defendants Anderson, Seesing, Gast and McCafferty entered please of guilty prior to the commencement of the trial. Defendant McGilvray has not been found and remains at large.

I believe his hours of flight time were quite a bit more than Andersons's. I would have to check the records on that to make sure.

But I think his records outweighed Anderson's, or his credentials.

MR. HOFFMAN: Agent Rinehart, is there anything else you would like to clear up before we go into the overt acts?

MR. RINEHART: Okay.

MR. HOFFMAN: Let's go through the overt acts beginning with paragraph 9. The overt acts will show how it was part of the conspiracy, the charges in paragraphs 1 through 8.

(Tr. 39).

Thereafter Agents Rinehart and James generally alternated their testimony with respect to each of the overt acts alleged in paragraph nine of the proposed superceding indictment. On several occasions, Assistant United States Attorney Hoffman interjected to refer the jurors to the substantive count in the indictment which corresponded to the testimony they were about to receive from Agent Rinehart or James regarding an overt act. The following excerpt is representative of the nature of the remainder of the Rinehart/James joint testimony:

MR. HOFFMAN: I believe, Agent Rinehart, that an analysis of the telephone tolls of the Sanderson number in Daytona Beach reveals numerous calls by and between various of the defendants charged in the indictment, is that correct?

MR. RINEHART: That's correct. We have calls from the Sanderson number, where Kook and Powers

reside, to several of the defendants alleged in the indictment.

MR. HOFFMAN: Go ahead with (c).

MR. JAMES: "On or about the 20th day of April, 1979, defendant Gregory Louis McCafferty, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio."

As you are aware, I traveled to Cleveland, interviewed people at the Ryder Truck Rental Company's district office on Brook Park Road in Cleveland, and, in reviewing their records for trucks rented to a George T. Markos, we determined that a George T. Markos had rented trucks, or a truck, a Ryder truck, from them on April 20, 1979.

There was a rental agreement in file reflecting the rental of a truck on that date. An employee of that company who rented the truck to Mr. Markos identified a photograph which was presented in what we call a photo spread, a series of photos, identified a photo of Gregory McCafferty as being the individual who had come in and rented the truck using the name George Markos.

MR. RINEHART: If you will notice from that overt act, then you will have a time period of April 23 through April 28 where there are several telephone calls made shortly after the rental of that truck.

Overt act (e) reads, "On or about the 23rd day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Daytona Beach, Florida."

MR. JAMES: There is a second rental of a truck in overt act (d) which I will cover before we get to the phone calls

* * *

(Tr. 44-46). The bulk of their testimony found Agent James relating information he had obtained respecting Ryder truck rentals and travel, as well as James Chadwick's alleged involvement, while Agent Rinehart undertook to weave this and other information into the network of telephone calls being summarized for the grand jury by Rinehart. The complete transcript of the grand jury proceedings at which Agents Rinehart and James were present jointly, apart from the reading of the indictment by the Assistant United States Attorney, is some sixty-two pages in length.

II.

Rule 6(d) of the Federal Rules of Criminal Procedure delineates who may be present before a federal grand jury:

> (d) Who May Be Present. Attorneys for the government, the witness under the examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Defendants, contending that the rule has consistently been strictly construed, insist that the presence of more than one witness before the grand jury at one time constitutes an appearance by an unauthorized person in violation of the rule. This, defendants claim, requires the dismissal of the indictment. The government asserts that the simultaneous use of two witnesses was militated by the complexity of the indictment and the underlying investigation so as to enable the grand jury to hear a summary of the indictment in a logical and coherent fashion. The government therefore urges a pragmatic construction of

Rule 6(d) and, in the alternative, an inquiry into whether any actual prejudice flowed from the Rinehart/James joint testimony.

The court will consider whether the Rinehart/James joint testimony constitutes a violation of Rule 6(d) and if so, the proper remedy for such violation.

III.

A.

Guidance in the proper construction of the phrase "witness under examination" as used in Rule 6(d) can be found in the rule's somewhat sparse history.[6] As excerpted in *United States v. Carper*, 116 F.Supp. 817 (D.D.C.1953), wherein three deputy marshals were present during a witness' testimony before a grand jury, the proceedings of The Institute on Federal Rules of Criminal Procedure provides the following insight into the drafter's intent:

> The minutes of the proceedings show the following discussion of Rule 6(d) by the Honorable George Z. Medalie, then Associate Judge of the New York State Court of Appeals and a member of the Supreme Court Advisory Committee:
>
> > "When I first heard of Federal criminal procedure, I found that it was the practice to try to get rid of indictments by proving that someone was in the grand jury who had no right to be there, and usually it was some deputy marshal or somebody else, some unauthorized person, and then the great to-do was how to get a person authorized. One of the ways to get a

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[6] The Federal Rules of Criminal Procedure became effective on March 21, 1946.

stenographer authorized in those days was to have him sworn in as Assistant United States Attorney, when he really was nothing of the kind.

"Now, cases have come up on motions to quash because of unauthorized persons in the grand jury room, so we drew up a little list as to who is authorized. That is provided for. We say 'attorneys for the government'—the phrase 'attorney for the government' is defined and limited in Rule 27; 'the witness under examination'—no one has ever moved to dismiss on account of his presence; 'interpreters when needed.' Now, here is a little touch which we picked up because of the wide geographic distribution of the membership of our committee. We didn't say 'an interpreter.' We said 'interpreters.' [We discovered that in some of the Southwestern districts it is at times necessary to have two interpreters in the grand jury room, for example, one who knows the Indian language and Spanish, but doesn't know any English—fortunateiy knows the Indian language, the particular Indian dialect—and another who knows Spanish. So we said 'interpreters' instead of 'interpreter.']"

116 F.Supp. at 819-20, *citing* New York University School of Law Institute—Proceedings, IV *Federal Rules of Criminal Procedure With Notes and Institute Proceedings* at 153-54 (1946) (footnote and emphasis omitted) (bracketed material deleted in court's excerpt).

As implicitly recognized in Judge Medalie's comments, the rule speaks of "witness" in the singular whereas the term "interpreters" was deliberately cast in the plural. *See also* Dession, *The New Federal Rules of Criminal Procedure: II*, 56 Yale L.J.

197, 202-03 (1947). This construction is consistent with the common law practice as set forth in the treatise *History of the Criminal Law of England:*

> The grand jury sit by themselves and hear the witnesses one at a time, no one else being present except the solicitor for the prosecutor if he is admitted.

J. Stephen, 1 *History of the Criminal Law of England* at 274 (1883); *see also United States v. Carper,* 116 F.Supp. 817 (D.D.C. 1953); *People v. Minet,* 296 N.Y. 315, 73 N.E.2d 529 (1947); L. Orfield, 1 *Criminal Procedure Under the Federal Rules* § 6:73 (1966).

Case law on the question of whether two witnesses may appear simultaneously before a federal grand jury, though scant, is nearly uniform in its adherence to the common law practice. In *United States v. Edgerton,* 80 F.374 (D.Mont.1897), the presence of an expert witness who remained in the grand jury room after his testimony and observed and questioned subsequent witnesses was held to be violative of accepted grand jury practice, therefore requiring dismissal of the indictment. Similarly, in *United States v. Bowdach,* 324 F.Supp. 123 (S.D. Fla. 1971), it was held that the presence of a witness who played audio tapes for the purpose of refreshing the memory of other witnesses constituted a violation of Rule 6(d). It has likewise been held that Rule 6(d) is violated where an attorney for the government testifies before the grand jury and then, having resumed his prosecutorial role, remains in the grand jury room in the presence of other witnesses. *See United States v. Gold,* 470 F.Supp. 1336 1351 (N.D. Ill. 1979); *United States v. Treadway,* 445 F.Supp. 959, 962 (N.D.Tex.1978); *contra,* however, is *United States v. Birdman,* 602 F.2d 547 (3rd Cir. 1979) (holding that the attorney's presence is authorized under Rule 6(d) as that

of a "witness" on the one hand and as an "attorney for the government" on the other).

The government's position that the Rinehart/James joint testimony does not constitute a violation of Rule 6(d) is premised upon the rationale that practical considerations such as the manner and mode in which evidence may be most effectively presented to the grand jury are relevant factors in construing the limits of the rule. The government cites the following excerpt from *United States v. Echols*, 542 F.2d 948 (5th Cir. 1976), in support of its position:

> [W]e read the rule as accommodating the practical exigency of making all relevant information available to the grand jury in a meaningful and understandable manner.

542 F.2d at 952.

In *Echols*, a Federal Bureau of Investigation agent appeared as a witness before a grand jury for the sole purpose of operating a cinematic projector. The court found the agent to be a "witness under examination" and thus an authorized person under Rule 6(d), holding that:

> Logic dictates that, when it is necessary for the grand jury to examine evidence which can only be presented through the use of complicated machinery, Rule 6(d) must encompass those persons with the requisite skills to operate such machines and to give testimony concerning their operations. To interpret this Rule otherwise would insulate from the grand jury the meaningful production of evidence.

542 F.2d at 952. This reading of the rule comports with the ever increasing functions witnesses may serve in both the grand jury and petit jury settings. The dictum relied upon by the government, however, does not support the conclusion that the rule

authorizes joint testimony by two or more witnesses. At no time was the witness/projectionist in *Echols* present simultaneously with another witness. *Echols* merely recognizes the non-testimonial functions a witness may serve when, for example, audio or visual evidence can only be presented by persons skilled in the use of audio and visual equipment.

B.

There are essentially two public policies ascribed by Rule 6(d). The first is that grand jury proceedings should be private and, to the greatest degree possible, secret. In *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), the Court identified five justifications which underlie the need for grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

356 U.S. at 681 n.6, 78 S.Ct. at 986 n.6, *citing United States v. Rose*, 215 F.2d 617, 628-29 (3rd Cir. 1954); *see also United States v. Treadway, supra* at 163.

This policy is embodied in Rule 6(e) which imposes an obligation of secrecy upon all persons identified in Rule 6(d) with the traditional exception of "the witness under examination."[7] *See* New York University School of Law Institute—Proceedings, VI *Federal Rules of Criminal Procedure With Notes and Institute Proceedings* at 154-55 (1946). Rule 6(e) further provides that upon proper notice to the court, grand jury materials may be disclosed to:

> (i) an attorney for the government for use in the performance of such attorney's duty, and
>
> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

Fed.R.Crim.Proc. 6(e)(3)(A)(i)—(ii).

In the case at bar, grand jury materials were provided to Agents Rinehart and James under the authority of Rule 6(e)(3)(A)(ii). The obligation of secrecy imposed upon the agents with respect to the materials, however, did not further extend to their joint appearances as witnesses inasmuch as Rule 6(e) provides that "[n]o obligation of secrecy may be imposed upon any person except in accordance with this rule." *See* note

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[7] Rule 6(e)(2) of the Federal Rules of Criminal Procedure provides:

> General Rule of Secrecy.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

7, *supra; see also* L. Orfield, 1 *Criminal Procedure Under the Federal Rules* § 6:119 (1966).

Realistically, however, the secrecy of the grand jury proceedings was not threatened by virtue of the joint appearance in this case. Rather, concern here focuses on the second public policy implicit in Rule 6(d) which serves to guard against undue influence upon grand jury witnesses or the grand jurors:

> [W]itnesses and grand jurors sitting without the protection of a presiding justice [must] be free from the risk of intimidation attendant upon the presence of numbers or prosecution witnesses, particularly police witnesses, in the grand jury.

United States v. Kazonis, 391 F.Supp. 804, 805 (D.Mass.1975); *see also United States v. Bowdach, supra* at 124. In *People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947), the danger of permitting two witnesses to appear simultaneously before a grand jury was noted:

> There may have been prior expressions or conversations between the two witnesses which the one then giving testimony might well hesitate to repudiate or modify in the presence of others.
>
> • • •
>
> Such presence might also improperly suppress as well as elicit testimony. . . .

73 N.E.2d at 532. *Cf. United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

In the case at bar, the joint witness approach tended to be detrimental to the grand jurors' ability to assess the

credibility and personal knowledge of Agents Rinehart and James and to contrast and compare the substantive evidence elicited through their testimony. Throughout their joint testimony, the agents consistently couched their remarks in terms of "we know," "we believe" and "we inquired." In several instances, an agent referred back to and restated the other agent's prior testimony. In addition, on several occasions an assistant United States attorney elaborated on the testimony of the agents, using the collective "we."[8]

The added persuasiveness resulting from the collective presentation of the agents' testimony, though difficult to assess, would not have existed had each agent testified individually, inasmuch as they would have been unable instantly to supplement each other's testimony. In assessing whether their joint testimony was unduly persuasive, it must also be noted that they were government agents who had either been previously sworn as an agent of the grand jury or had previously testified individually before the grand jury, were privy to grand jury materials, and were in command of the entire investigation of the June 6, 1979, DC-6 plane crash. The court further observes that Agent James is Agent Rinehart's superior officer within the Charleston, West Virginia, office of the Drug Enforcement Administration. *See United States v. Bowdach*, *supra* at 124 ("The potential for undue influence . . . is made greater by the fact that the unauthorized person . . . was a government agent who possessed personal knowledge of the evidence being presented.").

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[8] While the substantive comments of the assistant United States attorney do not, standing alone, provide a basis for dismissal of the indictment, *see United States v. Bruzgo*, 373 F.2d 383 (3rd Cir. 1967), they are relevant to a full understanding of the impact of the Rinehart/James joint testimony.

C.

It is, of course, not possible to determine with certainty whether the Rinehart/James joint appearance undually emphasized their testimony and insulated them from the critical eye generally cast upon a witness testifying individually before a jury. While the joint testimony approach was doubtless convenient to the government, it was both improper and unnecessary. Although their sworn remarks touched upon and served to integrate the whole of the superceding indictment as presented to the grand jury, their testimony could have been presented separately without impairing the ability of the government to present its case fully, fairly and nearly as expeditiously. As earlier noted, the overt acts contained in paragraph nine of the August 10th indictment were used as a blueprint for the agents' joint testimony. The same structured approach could have been employed had each agent testified individually, thereby permitting the grand jurors to better assess the personal knowledge and credibility of the two agents. Indeed, at the time of the first indictment Agent James testified individually before the grand jury on June 14, 1979, for the stated purpose, in part, of answering any questions the jurors had about the proposed June 14th indictment. As with the joint August 10th testimony, Agent James' June 14, 1979, testimony immediately preceded the grand jury's deliberations and ultimate vote in favor of the return of the June 14th indictment.

In short, the joint witness approach utilized by the government with respect to Agents Rinehart and James served no legitimate purpose and, when contrasted with the traditional one witness method of eliciting testimony, tended to inhibit the effective evaluation of the agents' testimony. The rationale for the sequestration of witnesses at trial is equally applicable in this

context: "[T]o prevent the possibility of one witness shaping his testimony to match that given by the other witness. . . . " *United States v. Leggett,* 326 F.2d 613 (4th Cir. 1964), *cert. denied,* 377 U.S. 955, 84 S.Ct. 1633, 12 L.Ed.2d 499 (1964).

A further observation. The Advisory Committee on Criminal Rules' lone comment upon Rule 6(d) as originally enacted was that it "generally continues existing law." The court's inability to discover a single published decision in either the grand jury, civil trial or criminal trial contexts where two witnesses were permitted to testify contemporaneously is persuasive proof that the government's construction of the rule is contrary both the the rule as read on its face and to the accepted common law practice.

The court accordingly holds that the joint testimony of Agents Rinehart and James resulted in the presence of an unauthorized person before the grand jury and was, therefore, contrary to and in violation of Rule 6(d). The court turns next to consider the consequences of such a violation.

IV.

While there is a split of authority among the states as to whether the presence of an unauthorized person before a grand jury is *per se* prejudicial, thereby requiring dismissal of the indictment,[9] federal decisions which have addressed the point are, in the main, uniform in adhering to the *per se* rule. *See Latham v. United States,* 226 F. 420, 424 (5th Cir. 1915); *United States v. Treadway,* 445 F.Supp. 959, 962-63 (N.D.Tex.1978); *United States v. Phillips Petroleum Co.,* 435 F.Supp. 610, 618 (W.D.

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[9] *Compare State v. Manney,* 24 N.J. 571, 133 A.2d 313 (1957) (dismissal not warranted in the absence of actual prejudice), *with People v. Minet,* 296 N.Y. 315, 73 N.E.2d 529 (1947) (unauthorized person held to be a *per se* basis for dismissal).

Okla.1977); *United States v. Braniff Airways, Inc.* 428 F.Supp. 578, 589 (W.D.Tex.1977); *United States v. Isaacs,* 347 F.Supp. 743, 748-49 (N.D.Ill.1972); *United States v. Bowdach,* 324 F.Supp. 123, 124 (S.D.Fla.1971); *United States v. Borys,*. 169 F.Supp. 366, 367-68 (D.Alaska 1959); *United States v. Carper,* 116 F.Supp. 817, 820 (D.D.C.1953); *United States v. Virginia-Carolina Chemical Co.,* 163 F. 66, 75-76 (M.D.Tenn.1908); *United States v. Edgerton,* 80 F. 374, 375 (D.Mont.1877); *see also United States v. Echols,* 542 F.2d 948, 951 (5th Cir. 1976), *cert. denied,* 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed.2d 387 (1977); *United States v. Fall,* 10 F.2d 648, 649 (D.C.Cir.1925); *United States v. Gold,* 470 F.Supp. 1336, 1351 (N.D.Ill.1979); *United States v. Daneals,* 370 F.Supp. 1289, 1296 (W.D.N.Y.1974); *United States v. Boyle,* 338 F.Supp. 1028, 1036 (D.D.C.1972); *United States v. Powell,* 81 F.Supp. 288, 291 (E.D.Mo.1948); *United States v. Amazon Industrial Chemical Co.,* 55 F.2d 254, 261-62 (D.Md.1931); *United States v. Goldman,* 28 F.2d 424, 426-31 (D.Conn.1928); W. Whitman, *Federal Criminal Procedure* § 6.9 (1950); *but see United States v. Birdman,* 602 F.2d 547, 556-58 (3rd Cir. 1979), *cert. denied,* 445 U.S. 906, 100 S.Ct. 1084, 63 L.Ed.2d 322 (1979); *United States v. Terry,* 39 F. 355 (N.D.Cal.1899).

Justification for the *per se* rule is in part founded on the premise that a case-by-case analysis to determine whether the defendant was actually prejudiced would require a detailed inquiry that inevitably frustrates and undermines the secrecy of grand jury testimony. *United States v. Treadway, supra.* Of at least equal concern is the difficulty inherent in ascertaining whether actual prejudice resulted. It is said that requiring a showing of actual prejudice of a substantial likelihood of potential prejudice would offer opportunity for the condonation of the exercise of undue influence and, further, that a standard of

actual or even potential prejudice would impose upon the court a difficult burden that would outweigh the benefits to be derived. *See* Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* at 914 (4th ed. 1974). Utilization of the *per se* rule of dismissal may also fulfill in a given case the public policy of assuring fairness in the processes of justice, a policy which underlies the supervisory powers of the federal courts. *United States v. Birdman, supra* at 557, 558-60.

Yet, the instant case is markedly distinguishable from the legion of cases indiscriminately applying the *per se* rule. The violation of the one-witness requirement here occurred only in connection with the second, or superceding, indictment of August 10th under which the defendants were tried. The first indictment, then, was uninfected by the Rule 6(d) violation. It is especially significant to note that the two indictments were returned by the same grand jury. The court's review of the attendance and voting records of that grand jury reveals that each of these indictments was returned by a unanimous vote. A nucleus of the same seventeen grand jurors voted for each indictment. In addition, one other grand juror voted for the first indictment but did not vote on the second, while two others voted for the second indictment but did not vote on the first.

Several of the counts in the two indictments are identical or virtually so. So it is that the counts of the August 10th indictment which was identical to the same counts contained in the June 14th indictment have a probabie cause basis entirely independent of the testimony presented to the grand jury after the return of the first indictment. Such is the case with respect to the substantive counts of which the defendants Lill and Mechanik stand convicted. Mechanik was found guilty under the tenth count which is identical to the sixth count in the first indictment. Lill was convicted of the second and fourth counts which

are identical in both indictments except for the inconsequential fact that Gregory Louis McCafferty was charged as a fourth defendant in those same two counts in the first indictment but not in the superceding indictment.[10]

Thus, as to Lill and Mechanik on the substantive counts, there was neither prejudice nor potential for prejudice. Where neither is present, application of the *per se* dismissal rule is without virtue save for exemplary purposes. As will be developed, it is by no means necessary to dismiss the Lill and Mechanik substantive counts in order to assure future adherence by the prosecutor to the one-witness requirement.

The only remaining count requiring attention is the first count which, in both indictments, charges of the offense of conspiracy. Defendants Lill, Mechanik, Zarintash and Riddle were found guilty on the conspiracy count, with the jury being unable to reach a verdict as to defendant Mark Chadwick. In the second indictment there were a number of alterations and additions to the conspiracy count as it had appeared in the first indictment. Each of them was the subject of the Rinehart/James joint testimony. The alterations and additions remaining in the redacted version of the second indictment on the basis of which the case when to the jury are set forth below. In each instance the alteration and addition was either supported by testimony apart from the Rinehart/James joint testimony or became moot by virtue of the acquittal of Kook and James Chadwick:

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[10] The grand jury, in so doing, simply took McCafferty off the plane where he had been charged in the first indictment along with Lill and two others and placed him instead in the second indictment as a codefendant on the ground.

Addition of two defendants, James Chadwick and Russell Kook (Both acquitted.)[11]

Alteration of the origination point of the flight as being San Marcos in Columbia, South America, instead of San Marcos, Guatemala. (Supported in part by Rebecca Markos' testimony.)

Alteration of McCafferty's placement so as to allege that he was waiting at the airport, after having traveled in interstate commerce, to meet the DC-6 plane and receive its contraband cargo on the morning of June 6, 1979, instead of being placed on the plane. (Supported by Agent James' earlier solo testimony of August 2, 1979.)[12]

Addition of James Chadwick as one who, along with Mark Chadwick as originally charged, was also named as providing a safe place for the DC-6 to land. (James Chadwick acquitted.)

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[11] A third added defendant, McGilvray, is a fugitive who was not tried and remains at large. For failure of proof, he was struck from the redacted version of the second indictment.

[12] At the conclusion of Agent James' solo testimony of August 2, 1979, Assistant United States Attorney Hoffman cautioned the grand jury that they should not consider James' testimony on that occasion, at least to the extent given in summary form, as evidence that "would go toward probable cause of anybody else's involvement in these facts" (Court, *In Camera* Ex. 42 DD, p. 9). It is observed that James' solo testimony which serves to place McCafferty on the ground rather than on the plane, as well as his testimony on the same occasion with respect to the Ryder truck rentals and travel from Cleveland which were added as overt acts, was not presented in summary form nor did it constitute a showing of probable cause of the involvement of others not named as defendants to the first indictment. Consequently, while acknowledging that the scope of the Assistant United States Attorney's disclaimer is not free from doubt, the court chooses to treat the James solo testimony just noted as evidence for consideration by the grand jury. It is further noted that each of the overt acts relating to Ryder truck rentals were proved at trial beyond any doubt.

Addition of Mark Chadwick and James Chadwick as providing a safe place for the cargo of the DC-6 to be unloaded and a safe departure from the airport for the defendants and coconspirators. (James Chadwick acquitted. Testimony in connection with the conspiracy count of the first indictment, which charged Mark Chadwick with providing a safe place for the DC-6 to land, was sufficient to support the inclusion of a charge against him of providing as well a safe place for unloading the cargo and safe departure for the defendants and coconspirators. Moreover, count one of the first indictment had specifically charged that Mark Chadwick aided the flight of certain of the defendants after the DC-6 crash.)

Addition of seven overt acts alleging rental of Ryder trucks, namely, two in Charleston, West Virginia, by defendant Mechanik and five in Cleveland, Ohio, by defendant McCafferty. (Marsha Miller's testimony supported the Ryder rentals in Charleston on April 21, and 28, 1979, appearing as overt acts d and k. Agent James in his solo testimony of August 2, 1979, established the first two McCafferty rentals in Cleveland as having occurred at the same time as the two rentals just noted in Charleston, being spelled out in overt acts c and l as April 20 and April 28, 1979. Rebecca Markos tended to support the third Ryder rental in Cleveland by McCafferty, which occurred as set forth in overt act q on May 5, 1979, by her testimony that she had seen McCafferty in a Ryder truck in early May, 1979. The James solo testimony of August 2, 1979, also supported the June 3, 1979, rental by McCafferty in Cleveland as set forth in overt act y, as well as the exchange for the larger truck on June 5, 1979, as charged in overt act cc, which is also supported by the Rebecca Markos testimony.)[13]

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[13] *Id.* n. 12, at 59.

Addition of two overt acts, dd and ff, alleging interstate travel to West Virginia. (Both James' solo testimony of August 1, 1979, and Rebecca Markos' testimony support overt act ff charging travel from Cleveland on June 5, 1979.[14] William Clippard's testimony supporting the Spartanburg, South Carolina, rental by Mechanik on June 4, 1979, coupled with the White family testimony, serves to substantiate overt act dd of the same date charging travel from Spartanburg.)

Addition of overt act ii respecting James Chadwick's arrival at the jail at about 12:15 a.m. on June 6, 1979 (Supported by testimony of Kanawha County deputy sheriffs, Sergeant Larry Mullins and Corporal John Meadows. (James Chadwick acquitted.)

Addition of overt act gg respecting defendant Kook as having registered at a Ripley, West Virginia, motel on June 5, 1979. (Kook acquitted.)

Other alterations and additions to the indictment for which the joint testimony of Agents Rinehart and James was responsible were either stricken on motion at trial or resulted in acquittal. Their testimony was the basis for adding Russell Kook not only as a defendant charged with conspiracy in count one but also with a substantive offense in the seventh count. As noted, Kook was acquitted. The Rinehart/James testimony served to summarize the telephone toll records subpoenaed by the grand jury and resulted in adding to the conspiracy count the allegation, later stricken by the court at the close of the evidence, that the defendants, as one of four objects of the conspiracy specified in count one, conspired to unlawfully use a telephone com-

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[14] *Id.* n. 12, at 59.

munication facility in violation of 21 U.S.C § 843(b).[15] Also stricken were the twenty-one overt acts involving the telephone network alleged to exist between the defendants.

[4] Insofar, then, as the joint testimony of Agents Rinehart and James ultimately proved to be material, the grand jury also had before it ample independent evidence to support a probable cause finding of the charges as contained in the redacted version of the conspiracy count on which the case went to the trial jury, except as to defendant Kook and possibly defendant James Chadwick who were, of course, acquitted. Although the grand jury would, in my view, undoubtedly have returned the very same second indictment even had Agents Rinehart and James testified separately, it must again be acknowledged that a potential for prejudice by virtue of their joint testimony did exist. And, in the sense that all things are possible, even actual prejudice is conceivable. Yet, the existence of actual prejudice as to the conspiracy count is so utterly remote and the absence of actual prejudice as to the Lill and Mechanik substantive counts is so plain that a mere possibility of prejudice can appropriately be disregarded.

If the issue on which the court now passes were being squarely faced prior to trial, dismissal might well be decreed as the proper and prudent course. Pretrial dismissal would serve the salutary disciplinary function of underscoring the care which the prosecutor must observe in meeting the requirements of Rule 6(d) without, as in this case, conferring a windfall

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[15] The alleged unlawful use of a telephone communication facility was inserted in the second indictment, taking the place of the charge of obstruction of justice as one of the four objects of the conspiracy. Remaining unchanged were the other three alleged objects of the conspiracy, consisting of unlawful possession with intent to distribute a controlled substance, interstate travel with intent to promote an unlawful activity and importation of a controlled substance.

benefit on four defendants who stand convicted after a three-month trial conducted at enormous expense to the United States and the defendants.

Indeed, a review of the number district court cases cited *supra,* at 57-58, as adopting the *per se* dismissal rule discloses without exception that dismissal was ordered before trial.[16] The two remaining cases, which dealt with dismissal after trial, consist of the Fifth Circuit case of *Latham v. United States,* 226 F. 420 (5th Cir. 1915), in which the *per se* dismissal rule was applied, and the Third Circuit case *United States v. Birdman,* 602 F.2d 547 (3rd Cir. 1979), *cert. denied,* 445 U.S. 906, 100 S.Ct. 1084, 63 L.Ed.2d 322 (1979), in which the *per se* rule was avoided. Interestingly, even in the *Latham* case the utilizaton of the *per se* dismissal rule was of little moment inasmuch as the trial court conviction was also being reversed because of prosecutorial misconduct.

[5] Rule 6(d) does not prescribe the sanction to be imposed for its violation. The rulemakers have wisely left to the courts the responsibility of fashioning sanctions appropriate to the circumstances. In this case it is sufficient that action be taken to guard against the future violation of the one-witness requirement. In order to assure that the one-witness rule is observed in subsequent grand jury proceedings, the prosecutor will henceforth be directed routinely to advise the court with respect to each criminal case indictment whether the requirements of Rule 6(d) have been fulfilled. It is observed that the court will be in a position to monitor the accuracy of the reporting process

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[16] The court notes parenthetically that in several of the cases cited *supra* at 57-58, the question of dismissal was not reached, *see e.g. United States v. Isaacs, supra,* or dismissal was ordered for more than one reason, *see e.g., United States v. Braniff Airways, Inc., supra.*

not only through Title 18, United States Code, § 3500 disclosure, but also by virtue of the increasing frequency with which the court is called upon to review grand jury material for various *in camera* purposes.

V.

It is accordingly ORDERED that the motions of the defendants to dismiss the indictment by reason of the Rule 6(d) violation be, and the same are hereby, denied.

APPENDIX E

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

CRIMINAL ACTION
NO. 79-20045-03
79-20056

UNITED STATES OF AMERICA

v.

JEROME OTTO LILL
MARK DOUGLAS CHADWICK
JAMES F. CHADWICK
RUSSELL KOOK
SHAHBAZ SHANE ZARINTASH
MARSHALL MECHANIK
STEPHEN HENRY RIDDLE

ORDER

Following extensive pre-trial hearings and evidence, the then trial judge, Chief Judge Dennis R. Knapp, by findings spread on the record in open court on February 22, 1980, found that both reasonable cause and probable cause existed to detain, arrest and later charge the defendants Mechanik, Zarintash, Riddle and Gast with the offenses for which they were subsequently indicted. Those findings included the determination

that the Ryder truck being operated by the defendants (i.e., driven by defendant Mechanik and occupied by the other three defendants) was violating the law by speeding, by failing to yield to the signal of an officer and by efforts to run the officers off the road or prevent the officers from stopping the truck. Those findings also included the determination that these same officers, White and Osborne of the Montgomery city police department, observed the truck in Montgomery just after 1:30 a.m., on June 6, 1979, under rather suspicious circumstances, at which time their attention was called to the truck by an acquaintance, Butch Schultz, who observed that something was either being thrown or dropped off the truck.

The court hereby makes the following findings of fact and conclusions of law.

I.

Nothing adduced at trial warrants reconsideration and revision of Judge Knapp's findings and ruling. Nevertheless, as a result of evidence adduced during the course of the trial, Judge Knapp's findings are supplemented by the further finding, not specifically made by him, that the officers were informed by Schultz, at the time he called their attention to the truck, that something had either been thrown or dropped off the truck and that they should "check out that truck." Also, if is found that while in pursuit of the truck, Officers White and Osborne saw fit to radio for back-up help which arrived in the person of Officers Arthur and Johnson, of the police department of the nearby town of Smithers, some five to ten minutes after the truck was stopped.

II.

Findings have not been made, however, with respect to the voluntariness of certain of the statements introduced during the Government's case and made by defendants Zarintash and Mechanik while detained on Route 61 on the open highway at Eagle, West Virginia, following the stop by Officers White and Osborne, nor have specific findings been made with regard to the propriety of the search at the same time and place respecting the ground-to-air radio and the jacket, as well as the money contained within the jacket, although evidence as to those statements and items has been admitted.

In this connection, the court finds that, at the time of the stop, Officers White and Osborne emerged from their police cruiser with weapons drawn. They approached the cab of the Ryder truck with White on the left side, armed with his revolver, and Osborne on the right with his shotgun in hand. Save for one brief period when White holstered his revolver, each White and Osborne held his gun in hand throughout the entirety of the time covered by these findings. No *Miranda* warnings were given to the defendants at any time while they were detained at Eagle. Upon reaching the cab of the truck, White asked the driver, defendant Mechanik, to exit the cab and turn over his operator's license and truck rental agreement. Mechanik complied. White at the same time also routinely inquired of Mechanik where he was going. Mechanik answered within the hearing and presence of the others that they were headed back to South Carolina. The question was permissible under the circumstances and the answer is deemed voluntary.

White then directed the remaining two occupants in front, defendants Zarintash and Riddle, to exit one at a time, which they did, leaving the keys in the ignition. All three were then

aligned by the side of the truck with hands in the air when Osborne discovered that a fourth individual, defendant Gast, was in the back of the truck. Gast was directed to leave the truck and align himself with the other defendants at the side of the truck, which he did. Thereafter, while the defendants remained in a search position at the side of the truck after being frisked, and while White was between them and the open door of the cab of the truck, White observed on the floor of the cab a blue container, which is in evidence as Government Exhibit 57.

The court's study of Government Exhibit 57 reveals the following: The blue container (or blue box, case or package as it has sometimes been referred to in the evidence) is a free-standing unit that is 14½ inches high, 10½ inches wide across the front and back, and 4 inches deep. It is hand-carried by use of a one-inch wide metal handle spanning the width of the container across the top, with the handle being appended to each side of the container. The top one-fifth of the container is a lid section used to open and close the container. It also houses a microphone. The top section is hinged on the back and latched on the front by a pair of metal latches or snaps which join the top and bottom sections of the container. The metal latches or snaps are not lockable by key or otherwise. The container, which houses the radio and its battery or power pack, was latched shut when seen by White on the cab floor. On the rear side of the bottom section of the blue container is a small door which opens to a cord and plug compartment area[1] not unlike

[1] The compartment door is hinged at the top and latched at the bottom by means of a built-in screw with an interior catch. The door is opened by turning the screw one-quarter of a turn with a screw driver or a thin coin or similar implement. The door measures 2¼" by 3¾". The compartment is somewhat larger, measuring approximately 2¾" × 5⅜" and it is 1⅞" deep. Within the compartment area is crammed the

that of many electronic devices. A tiny triangular section trimmed away from the bottom corner of the door normally leaves visible from without a portion of the cord stored within.

In essence, the container, the radio and the battery-speaker section are three parts of an integrated unit. It is noted that the battery-speaker section is three times the size of the radio and has neither a front nor back wall. Once the battery-speaker section is inserted into the container, the front and back walls of the container serve to enclose the battery-speaker section. As already indicated, the overall dimensions of the container establish it as being a slender, compact unit just over a foot high and just under a foot wide, with a four-inch depth. Upon lifting this unit by its handle, one is immediately impressed by its weight of some 22 pounds which is exceptionally heavy for a container of its modest dimensions.

Footnote 1 continued:

following:

(1) A 5½ foot electric cord with plug for plug-in to an exterior electric power outlet.

(2) A 4-foot battery cord with plug which can be plugged into a receptacle within the compartment itself if the unit's battery is used as the power source; or, if an outside source is to be used, the plug is connectable to any outlet similar to that receiving an automobile cigarette lighter.

(3) A 1-foot antenna line or cord with twin metal couplings designed so as to permit connection to an exterior antenna.

A very small triangular section of each of the two bottom corners of the compartment door is trimmed away in such fashion as to provide openings through which the cords may run outside the compartment and yet permit the compartment door to be closed. When the door is closed and the cords are all stored within, a small section of cord can normally be seen from an exterior view of the door through one of the small triangular openings.

Although the appearance of the blue container could not in and of itself be reasonably said to have given rise to a reasonable belief on the part of the officers that it constituted a threat to the safety of the officers so long as White stood armed between the defendants and the cab of the truck, White nevertheless inquired of the defendants as to what the blue container was.

White made his inquiry because he was looking for anything that would shed light on the reason the vehicle ignored his signal and failed to yield to his other efforts to bring it to a stop and because he was checking to determine whether there was anything in the vehicle that could be harmful to himself and his fellow officer before permitting either the driver or the other three defendants to return to the truck. In addition, it is again noted that White had already been alerted that something had been thrown or dropped off the truck as it passed through Montgomery during the early morning hours. As a result, the officers could justifiably have been concerned that, upon return of the defendants or any of them to the truck, evidence which might have been the instrumentality of a crime would be destroyed or secreted.

To White's question of the defendants respecting the blue container, the defendant Zarintash responded that it was his radio. White then reached into the cab of the truck and set the blue container on the truck's running board. In doing so, he would have become aware of the unusually heavy weight of some 22 pounds for a unit of its modest dimensions. White thereupon directed Zarintash to open the blue container on the running board of the truck, which Zarintash then did, revealing the ground-to-air radio useable for short to medium range communication between ground and airborne craft.

As earlier found, probable cause existed to arrest at least the driver, Mechanik, at the time of the stop on the public highway for multiple moving traffic violations. In addition, the presence of exigent circumstances served to authorize the search of the blue container found on the floor of the cab. In particular, the peculiar actions of the driver in thwarting the efforts of the officers to bring the speeding truck to a stop, coupled with knowledge of the officers that something had been thrown or dropped from the truck as it moved through Montgomery late at night, were sufficient to justify their concern on their part that their safety would be in danger once they permitted the four defendants, or at least the defendants other than driver Mechanik, to return to the truck. These very same factors also justified a search for destructible evidence, especially in view of the mobility of the truck and the awareness by the officers that their attention had been called to the truck because something had been discarded from it only minutes before the stop. Moreover, the size and appearance of the blue container, together with its extraordinary weight, would swiftly lead one to the objective conclusion that the unit was neither personal luggage nor an item in which a reasonable expectation of privacy could be said to exist under these circumstances.

Thereafter, Zarintash, voluntarily and without prompting of any kind by the police officers present, asked White if he might put on his jacket which was also in the cab of the truck. White told him no and then picked up the jacket, observing bulges in the pocket. White, out of appropriate regard for his safety, felt the bulges. Once having felt the bulges to be soft, he no longer considered the contents of the pocket to be a threat to his safety. He nevertheless opened the pocket, extracting currency from it which aggregated some $3,850.00. White asked

Zarintash how much money was in the jacket. White understood Zarintash to respond, "Somewhere around $2,000.00." White next had Zarintash count the money and then handed Zarintash his jacket.

In view of Zarintash's voluntary and unprevoked request for his jacket, White's pat-down of the jacket was warranted so as to assure his safety and that of his fellow officers. Once having felt the soft bulges (the currency) in the jacket pocket, White was justified in opening the pocket in a search for destructible evidence before handing the jacket over to Zarintash. Otherwise, Zarintash could easily have hidden or discarded the currency. Moreover, the officers were acutely aware that something had been discarded from the truck while in Montgomery shortly before the stop. Zarintash's oral request for the jacket was without prompting and is, under the circumstances, deemed voluntary. The subsequent statements by Zarintash with respect to the amount of the money were the result of custodial interrogation without benfit of *Miranda* warnings and are deemed inadmissible.

Thereafter, approximately twenty minutes after the vehicle was initially stopped, Officers White and Osborne received a radio message to hold the truck and its occupants for questioning with respect to the plane crash as Kanawha Airport. Prior to that time, there were not under formal arrest.

III.

Based upon the foregoing, the court finds and hereby holds that at the time of the stop and the ensuing search of the radio and jacket, Officers White and Osborne had probable cause and the statutory authority to arrest the driver of the truck, Mechanik, for the multiple moving traffic offenses which took

place in the presence of the officers. *See* W. Va. Code §§17C-18-1, 17C-19-1 to 5 (1974 Replacement Vol.). As such, and in light of the exigent circumstances heretofore described, White and Osborne were entitled to search Mechanik and any object within his immediate access or within the cab to which either Mechanik or the other defendants would be returned if released, in order to discover any weapons or destructible evidence. *United States v. Robinson,* 414 U.S. 218 (1973); *Chimel v. California,* 395 U.S. 752 (1969); *United States v. Moore,* 554 F.2d 1086 (D.C. Cir. 1976); *United States v. Green,* 465 F.2d 620 (D.C. Cir. 1972). *See also Chambers v. Maroney,* 399 U.S. 42 (1970). The fact that White and Osborne had not placed Mechanik under formal arrest for the traffic violations did not obviate their authority to search inasmuch as probable cause to arrest existed at the time of the search. *United States v. Ricard,* 563 F.2d 45 (2d Cir. 1977), *cert. denied,* 435 U.S. 916 (1978); *United States v. Jenkins,* 496 F.2d 57 (2d Cir. 1974), *cert. denied,* 420 U.S. 925 (1974). Accordingly, the radio and jacket are deemed admissible.

The court further finds and hereby holds that White's question regarding the radio directed to the defendants was made at a time when the defendants were in custody and constituted impermissible custodial interrogation without the benefit of any of the Fifth Amendment protective warnings prescribed by *Miranda. Rhode Island v. Innis,* 48 U.S.L.W. 4506 (May 13, 1980). Zarintash's response to White's inquiry is therefore deemed inadmissible. Likewise, Zarintash's responses to White's inquiries concerning the money in the jacket pocket constituted impermissible custodial interrogation in view of the absence of *Miranda* warnings. It, too, is deemed inadmissible.

In connection with the Zarintash statement regarding the

radio, the court observes that on direct examination of the witness Joseph Johnson by counsel for Zarintash, the witness was asked these questions and gave these answers:

> Q Did you see Sgt. White go into that vehicle?
>
> A Yes, sir.
>
> Q On how many occasions, if you remember?
>
> A Three occasions. The first occasion he brought out a radio and asked who the radio belonged to and Mr. Zarintash said it was his and he told Mr. Zarintash to open up the radio, which he did. He did what Sgt. White told him to.

The court notes that the answer of the witness respecting Zarintash's statement regarding the radio was not responsive to the question. Moreover, some time after that response, motion was made to strike the answer as being unresponsive to the extent that it included Zarintash's assertion of ownership of the radio. The motion is granted and the statement is excluded accordingly.

IT IS SO ORDERED.

The Clerk is directed to serve upon counsel of record and the defendants certified copies of this order.

ENTER: June 11, 1980

S/S John T. Copenhaver, Jr.

JOHN T. COPENHAVER, JR.
United States District Judge